IN THE SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1899.

Henry Clews, Charles M. Foster and James B. Clews,
Petitioners,

vs.

Malcolm M. Jamieson, Roland C. Nickerson, Harry F. Billings, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan and A. L. Dewar,
Respondents.

Petition for writ of certiorari, requiring the United States Circuit Court of Appeals for the Seventh Circuit to certify to the Supreme Court for its review and determination the suit of Henry Clews, Charles M. Foster and James B. Clews, appellants, against the aforesaid Malcolm M. Jamieson, Roland C. Nickerson, Harry F. Billings and others, appellees.

To the Honorable, the Supreme Court of the United States:

The petition of Henry Clews, Charles M. Foster and James B. Clews, respectfully shows to this honorable court as follows:

(1.) That this is an unusual case growing out of a not unusual transaction. The transaction was the sale by the petitioners of certain shares of stock for "the account," (*i. e.*, for future delivery) on the Chicago Stock Exchange according to the rules, customs and methods of the exchange.

The case is unusual in that it is the first case arising in the

United States where the rules, customs and regulations of a stock exchange clearing house have come under judicial investigation.

(2.) That the rules, customs and methods of the Chicago Stock Exchange are not peculiar to that institution, but that similar customs and methods obtain among stock exchanges throughout the civilized world. The rules and customs here involved represent the application of the clearing house principle, made familiar through modern methods of banking, to commercial enterprise.

See Jevon's Money and the Mechanism of Exchange, Appleton's Ed., pp. 281 and 282, and note.

See also *Political Science Quarterly*, Vol. 8, No. 2, p. 252, June, 1893, where Mr. Alexander D. Noyes, in an article, says:

"The system of clearing houses for stocks is not new. It was adopted in the New York Stock Exchange only in the early months of 1892, but it has been in existence elsewhere for at least twenty-five years. * * * Ordinarily, in the first experiments, they took the form of the so-called 'ringing out' of contracts in the same security. By this plan, if A sold B a given amount of one security, and if B had presently sold the same amount to C, the series of trades could be personally adjusted between the three traders so that the only actual exchange required would be the transfer of the securities from A to C. *Of course, the number of traders in the series might be extended indefinitely, for the system did not require that the prices at which the trades were made should have been uniform.* * * The first official establishment of this kind in Europe was founded at the Handelskammer of Frankfort, May, 1867, principally for the purpose of dealing in government securities, United States bonds in particular. The Berlin Exchange adopted the system in 1869; Hamburg in 1870; Vienna in 1873, and London in 1876. The Paris Bourse, owing to its peculiar system of limitation on exchange membership, has never established a regular clearing house for stocks, but the same ends are attained by a voluntary comparison of accounts by brokers' representatives, similar in its general workings to the system of bank clearings."

(3.) That the particular transaction giving rise to this controversy differed not at all from innumerable transactions theretofore had on the Chicago Stock Exchange, where stocks had been bought or sold for future delivery, save only in the fact that petitioners sought redress for their grievances in the courts of the land instead of submitting themselves to the *quasi*-judicial tribunal established by the exchange; and this not through any suspicion or misgiving as to the entire fairness of the tribunal of arbitration established by such exchange, but because that tribunal had become, so to speak, *functus officio*, as will hereinafter more fully appear.

(4.) That the points in issue in this application are:

First: Is a contract for the buying or selling of shares of stock for "the account," *i. e.*, for future delivery, on the Chicago Stock Exchange, and according to the rules, customs and regulations of that exchange, a gambling contract *per se?* The United States Circuit Court of Appeals, of its own motion in this suit, held that it is.

Second. Is the clearing house machinery of the Chicago Stock Exchange adequate to bring the vendor of shares of stock, as an undisclosed principal, and the ultimate purchaser of such shares together, so that, notwithstanding the daily novations and substitutions incident to a sale for future delivery on the exchange, there exists, on the day for delivery, a privity of contract between them? The Circuit Court held in this suit that the undisclosed principal in such a contract could not recover from the ultimate purchaser for want of privity. The Court of Appeals did not consider this point at all.

(5.) That if the opinion of the Circuit Court is permitted to stand as the law of the land, it is equivalent to declaring that every one not a member of a stock exchange, desiring to buy or sell stocks for future delivery through members of an exchange with which such stocks are listed, must trust implicitly to the good faith of the members of such exchange for the consummation of the sale or purchase, but that he has no legal remedy or recourse whatever, —not against his own broker, for the latter would only have agreed to buy or sell according to the rules and customs of the exchange of which he was a member and which he would have done; not against the ultimate vendor or purchaser, because he would not, according to the decision of the Circuit Court herein, be privy to the contract between his broker and such ultimate vendor or purchaser.

That if the opinion of the Circuit Court of Appeals is permitted to stand as the law of the land, it is equivalent to declaring that whoever buys or sells shares of stock for future delivery on a stock exchange according to the rules and methods of such exchange, is a gambler *per se;* and your petitioners aver that the result must be either that the stock exchanges of America will adopt different rules, customs and methods, thereby exchanging the telegraph for the dray, or be a law unto themselves; for that by the decision of the Circuit Court of Appeals herein these institutions, confessedly necessary to modern commerce, are judicially branded as outlaws.

(6.) Your petitioners further show unto this honorable court that the only reason given in the opinion of the Circuit Court why your petitioners should not recover in this case is because the rules, customs and methods of the Chicago Stock Exchange, while resulting in a valid and binding contract between the brokers or members of the exchange in whose names the contract was exe-

cuted, did not create a privity in such contract in the undisclosed principals of such brokers or members.

That the Circuit Court of Appeals, without passing upon the question of privity *or any question raised by the pleadings and evidence in this case*, of its own motion affirmed the judgment of the Circuit Court on the ground that every sale for "the account," that is to say, for future delivery, on the Chicago Stock Exchange, according to the rules and methods of such exchange is, and must be, a gambling contract.

That this suit, therefore, is not alone of interest to petitioners, but involves the legality of daily and multitudinous transactions in the sale and purchase of stocks through the different exchanges in the United States, and that it is of the utmost importance to the general public that the rules, customs, usages and methods peculiar to the stock exchange as an institution, should be investigated by this honorable court and their legality or illegality authoritatively and finally determined after an opportunity afforded to the parties interested to be heard on the question.

(7.) Your petitioners further aver that on the 25th day of September, 1896, your petitioners, as complainants, filed in the Circuit Court of the United States for the Northern Division of the Northern District of Illinois their bill of complaint on the equity side of said court against Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, doing business as a copartnership under the name of Jamieson & Company, and Charles Henrotin, Edwin G. Foreman, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan and A. L. Dewar, constituting the governing committee of the Chicago Stock Exchange, and against Gustavus A. Schwartz, John Dupee, John W. Conley and Isaac J. Bloom, doing business as copartners under the name of Schwartz, Dupee & Company; that your petitioners, said complainants, were, at the commencement of said suit, citizens and residents of the State of New York, and said defendants were citizens of the State of Illinois, residing in the Northern Division of the Northern District of said State, and jurisdiction of said Circuit Court of the United States was and is dependent entirely upon the opposite parties to said suit and controversy being citizens of different States, and that the matter in dispute in said suits exceeds, exclusive of interest and costs, the sum and value of two thousand dollars.

Your petitioners further show that upon filing said bill of

complaint, a subpœna issued out of the clerk's office, directed to all said defendants, and was placed in the hands of the marshal for service, which subpœna required said defendants to appear in said suit on or before November, 1896, rule day, and which subpœna was duly served upon all said defendants.

(8.) That thereafter each of said defendants entered his appearance, and on the 28th day of November, 1896, the said Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings filed their joint answer to said bill; that on the fourth day of December, 1896, the defendants, Charles Henrotin, Edwin G. Foreman, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan and A. L. Dewar, constituting the governing committee of the Chicago Stock Exchange, filed their demurrer to said bill, which demurrer was, on the first day of March, 1897, overruled by the court, and said defendants afterward, on the first day of April, 1897, filed their answer to said bill; that on the eighth day of December, 1896, the defendants Gustavus A. Schwartz, John Dupee, John W. Conley and Isaac J. Bloom, filed their joint and several answer to said bill; that said complainants filed replications to all of said answers.

(9.) That afterward, to wit, on the 25th day of April, 1898, your petitioners and the respondents, Jamieson & Company, entered into a stipulation whereby it was agreed that your petitioners might file instanter an amended bill, and the respondents, Jamieson & Company, might file instanter an answer to said amended bill, the answer of the other defendants to the original bill to stand as the answer to your petitioners' amended bill, and the replications theretofore filed to stand as replications to all the answers, and on the same day an order of the court was entered giving effect to said stipulation; and, accordingly, on the 25th day of April, 1898, your petitioners, in pursuance of said order, filed their amended bill in said case, and on the same day the respondents filed their answer thereto.

(10.) That your petitioners' said amended bill, after alleging the jurisdictional facts as above set forth, stated, among other things not material to this application as your petitioners are advised, that they were a copartnership engaged in the business of buying and selling stocks, bonds and securities, under the name of Henry Clews & Company; that the defendants, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings were a copartnership under the name of Jamieson & Company, conducting the business

of buying, selling and exchanging bonds, stocks and other securities, and also conducting a general brokerage business for the purchase and sale of like properties; that for some time prior to the filing of said bill there existed in the city of Chicago a voluntary association of stock-brokers, known as the Chicago Stock Exchange, which had adopted a constitution and by-laws for its government; that said association was formed for the purpose of opening an exchange where its members could meet together to buy and sell such stocks and securities as should be listed with said exchange, and where its members could make contracts for said sales and purchases under the rules and customs of said exchange; that the government of the exchange was vested in a governing committee, composed of the president of the exchange and twenty-four (24) members; and that during and since the month of July, 1896, the governing committee, duly elected and acting as such, were the defendants, Malcolm M. Jamieson, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan and A. L. Dewar.

Said amended bill further alleged that in the month of July, 1896, your petitioners, complainants in said bill, directed their brokers in Chicago, Schwartz, Dupee & Company, being composed of Gustavus Schwartz, John Dupee, John W. Conley, and Isaac J. Bloom, to sell on account of your petitioners at the rooms of the Chicago Stock Exchange, and in accordance with its rules and customs, seven hundred (700) shares of the capital stock of the Diamond Match Company, a corporation, which stock had been duly listed as one of the stocks which might be sold and purchased in said exchange; and that your petitioners directed said Schwartz, Dupee & Company to sell said shares for delivery on the 31st of August, 1896; that on August 3, 1896, said Schwartz, Dupee & Company sold on said exchange to defendants, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, respondents herein, eleven hundred and fifty (1150) shares of the capital stock of the Diamond Match Company, and agreed and contracted to deliver the same to the said Jamieson & Company, or to such persons as might become the assigns of said contract under the rules of said exchange on the 31st day of August, 1896, and the said respondents agreed to accept and receive said stock from said Schwartz, Dupee & Company on the 31st day of August, 1896, at the agreed price of two hundred and twenty-two dollars ($222) per share for each and every share of said stock

That said sales were made by the said Schwartz, Dupee & Company in their names, but therein as to 700 of said shares included in said 1150 shares they were acting for and in behalf of your petitioners, as your petitioners' agents or brokers, and as to the remaining 450 shares the said Schwartz, Dupee & Company were acting on behalf of other clients than your petitioners.

That on the third day of August, 1896, the manager of the clearing house of said exchange being thereto by the rules and by-laws of said exchange duly authorized, delivered to said Schwartz, Dupee & Company a statement showing a sale by said Schwartz, Dupee & Company to the said Jamieson & Company of said 1150 shares of stock, and said manager also delivered to said Jamieson & Company a statement showing a purchase by said Jamieson & Company from said Schwartz, Dupee & Company of said stock.

That on the 31st day of August, 1896, and during business hours provided by the rules, by-laws and customs of said exchange the said Schwartz, Dupee & Company tendered to the respondents certificates for 1150 shares of the Diamond Match Company, duly issued by it, and duly indorsed and transferred so as to vest in the said respondents the title thereto upon delivery thereof, and the said Schwartz, Dupee & Company then and there offered to carry out said contract of sale and offered to deliver said shares of stock to the said respondents, but the said respondents refused to accept the same, and refused to carry out their said contract of purchase, and refused to pay the said Schwartz, Dupee & Company for said stock.

That upon said refusal of said respondents to carry out their contract the said Schwartz, Dupee & Company informed your petitioners of said refusal, and on the 11th day of September, 1896, said Schwartz, Dupee & Company, in writing, notified respondents that said sale as to seven hundred shares of said stock was made by the said Schwartz, Dupee & Company as agents for and on behalf of your petitioners, and notified said respondents that your petitioners might rightfully take any proceeding to enforce said contract of sale, and to make settlement of said transaction as to the said seven hundred shares; that thereupon upon the same day your petitioners notified the said respondents that your petitioners would proceed to sell said seven hundred shares of stock at public auction to the highest bidder, for cash; and that your petitioners would look to said respondents to pay and settle any difference and any loss or damage accruing to your petitioners if said stock should sell for less than the price which the said respondents had agreed to pay therefor. That your petitioners also notified said respondents that in the meantime they held said stock ready for delivery to said respondents upon payment of the amount due on said contract of sale

as to said seven hundred shares, but that the said respondents had utterly refused to pay for and receive said stock, and thereupon your petitioners proceeded to advertise said stock for sale at public auction.

Said amended bill further alleged that on the 22d day of September, 1896, your petitioners offered said stock for sale, at public auction, and the same was struck off to the highest bidder for the sum of one hundred and thirty dollars per share.

Said amended bill further alleged that your petitioners made every reasonable effort by advertisement and by bringing notice of said sale before the public, and before brokers and bankers generally in Chicago and vicinity, to induce persons to bid at said sale, but that your orators were unable to obtain a greater sum for said stock than $130 per share. That on the 31st day of August, 1896, the said shares of stock were worth in the market not to exceed $130 per share, and that your petitioners had suffered damages to the amount of $64,000 by reason of the failure of said respondents to accept and pay for said stock, and that the expense of selling the same at auction was the sum of $46.75.

Said amended bill further alleged that on the 23d day of September, 1896, your petitioners notified said respondents of said sale, and of the amount bid for said stock, and that your petitioners would hold the said defendants liable for the difference between the price agreed to be paid by said respondents for said stock, and the price bid at said auction, and for all other damages which your petitioners had sustained by reason of their (respondents') failure to accept and pay for said stock.

Said amended bill further alleged that at the time said contract for the sale of said stock was made upon the said stock exchange, the said Schwartz, Dupee & Company, as provided by the rules of the said stock exchange, deposited with the clearing house of said stock exchange, the sum of eleven thousand five hundred dollars, being ten dollars per share on the stock sold as aforesaid, in trust as security for the faithful performance on their part and on the part of the clients for whom they were acting, of said contract of sale, and at the same time the said respondents, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings had also deposited with the clearing house of said stock exchange the sum of eleven thousand five hundred dollars, being ten dollars per share, in trust to secure the faithful performance on the part of said respondents of their contract of purchase of said stock and to pay for the same; and the manager of said clearing house, under the rules and by-laws of said stock exchange, received said sums and the same were, at the time of the filing of the original bill herein, in the control and possession of the governing committee of said stock exchange, naming the members of said committee.

Said amended bill further alleged that on the 24th day of September, 1896, the said Schwartz, Dupee & Company requested the said respondents to consent that the Chicago Stock Exchange pay to the said Schwartz, Dupee & Company seven thousand dollars of the amounts so deposited to secure the performance of said contract, and offered to credit the said respondents with said amount deposited by them, to wit, seven thousand dollars on the damages sustained by reason of the default of said respondents; and that your petitioners, in writing, joined in said request and had offered upon receipt of said amount by Schwartz, Dupee & Company to credit the said respondents with the amount thereof.

That on the 24th day of September, 1896, the said Schwartz, Dupee & Company notified the defendants in said bill, being the governing committee of the said Chicago Stock Exchange, that said contract of sale as to seven hundred shares had been made by them on behalf of your petitioners, and demanded of said Chicago Stock Exchange and its governing committee the payment to them of the amount of said deposits on account of seven hundred shares, to wit, ten dollars per share deposited by Schwartz, Dupee & Company, and ten dollars per share deposited by said Jamieson & Company, and that your petitioners, in writing, concurred in said request.

That said amended bill concluded with a prayer that said respondents might come to a fair and just account of all the losses and damages sustained by your petitioners by reason of the failure of said respondents to accept and pay for said stock; and that said respondents might come to a fair and just account of the amounts deposited in the said Chicago Stock Exchange, as security for the performance of said contract, and that the said respondents might be decreed to pay to your petitioners the amount of said damages; and that said other defendants might be decreed to pay and deliver to your petitioners said trust fund, and that your petitioners might be further and otherwise relieved in the premises according to equity and good conscience.

(11.) That the answer of respondents to said amended bill of your petitioners, or so much thereof as your petitioners are advised is material to this application, admitted that in the month of July, 1896, they, the respondents, constituted a copartnership under the name of Jamieson & Company, and were conducting a business of buying, selling and exchanging bonds, stocks and other securities, and also a general brokerage business for the purchase and sale of like properties. Said answer alleged that in the month of July, 1896, respondents had bought and sold neither bonds, stocks nor securities for themselves, and that the firm of Schwartz, Dupee & Company, mentioned in said bill as the agents of your petitioners,

had been so informed and well knew. Said answer admitted that there was in existence in July, 1896, in the city of Chicago, a voluntary association of stock-brokers known as the Chicago Stock Exchange, as alleged in your petitioners' amended bill.

Said answer denied knowledge on the part of said respondents of the transactions between your petitioners and the said Schwartz, Dupee & Company, referred to in petitioners' amended bill, but alleged upon information and belief that all of the orders which your petitioners gave to Schwartz, Dupee & Company, for the sale of Diamond Match stock by said Schwartz, Dupee & Company, on behalf of your petitioners, during the month of July, 1896, were filled by Schwartz, Dupee & Company before August 1, 1896, by said Schwartz, Dupee & Company, making contracts for such sale and delivery on the stock exchange, and denied that any of said orders had been filled by selling or making contracts for the sale of said stock to the respondents, and denied that respondents were parties to any of the contracts made either in their own names, or on behalf of your petitioners, by Schwartz, Dupee & Company, in executing the orders referred to in said amended bill.

Said answer further denied that on August 3, 1896, Schwartz, Dupee & Company sold on the exchange to the respondents 1150 shares of the stock of the Diamond Match Company, for delivery on August 31, 1896, as in petitioners' bill alleged, or that the respondents agreed to accept and receive said stock; and denied that said respondents did, on August 3, 1896, make any purchase from Schwartz, Dupee & Company, as agents or brokers for your petitioners, of stock of the Diamond Match Company. But said answer admitted that on or about August 3, 1896, the manager of the clearing house of said stock exchange delivered to respondents a memorandum, stating that he had settled all of their trades on the stock exchange of that day, by substituting them as purchasers from Schwartz, Dupee & Company of 1150 shares of Diamond Match stock, and averred that this substitution, if it had any effect, which respondents refused to admit it had, did not substitute the respondents as purchasers in any contract of sale which Schwartz, Dupee & Company had made on behalf of your petitioners, for the sale of Diamond Match stock, either on August 3, 1896, or prior thereto, and that it did not, in any manner, change or affect the contracts which Schwartz, Dupee & Company had theretofore made on behalf of your petitioners, for the sale of Diamond Match stock, but that on the contrary, said substitution was a mere attempt at a settlement of differences of all the sales in Diamond Match stock made on that day by the different members of the stock exchange, including Schwartz, Dupee & Company and the respondents, for the convenience of adjusting transactions between the brokers them-

selves, but without affecting in any way the rights or liabilities of the principals whom said brokers respectively represented, and for whom they had made such purchases and sales. And that the sales of Diamond Match stock, which Schwartz, Dupee & Company had made on August 1, 1896, and which had been made as the basis of the substitution above referred to, were not—except to the extent of fifty shares—sales which they made to the respondents at all, nor were they sales which were made by Schwartz, Dupee & Company on behalf of your petitioners, but that, on the contract, the orders which your petitioners had theretofore given Schwartz, Dupee & Company for the sale of Diamond Match stock had been, prior to that date, filled by Schwartz, Dupee & Company, by making sales to other parties than the respondents, and at a different price than that stated by the manager of the clearing house in the substitution above referred to.

Said answer admitted that on the 31st day of August, 1896, the said Schwartz, Dupee & Company tendered to respondents certificates for eleven hundred and fifty shares of stock of the Diamond Match Company, but disclaimed knowledge on the part of respondents whether or not said certificates were duly issued or whether they were endorsed or transferred so as to vest, if accepted, in the said respondents the title thereto. Said answer admitted, however, the tender of said stock (eleven hundred and fifty shares) and their refusal to accept and pay for the same.

Said answer further disclaimed knowledge on the part of said respondents whether the said Schwartz, Dupee & Company informed your petitioners of said refusal, or not; but said answer admitted that on the 11th day of September, 1896, Schwartz, Dupee & Company, in writing, had notified the respondents that said sale was made by the said Schwartz, Dupee & Company, as agents for and on behalf of your petitioners and had notified respondents that your petitioners might rightfully take proceedings to enforce said contract of sale, and to make settlement of said transaction, and that upon the same day your petitioners notified the respondents that they would proceed to sell said shares of stock at public auction, to the highest bidder, for cash, and that your petitioners would look to the respondents to pay and settle any difference, and any loss or damage accruing to the petitioners, if said stock should sell for less than the price which the said petitioners pretended, and still pretend, that the respondents had agreed to pay therefor.

Said answer further alleged that the respondents had informed Schwartz, Dupee & Company, on the 31st day of August, 1896, and your petitioners on the 11th day of September, 1896, that any contracts which they had made with Schwartz, Dupee & Company, at

any time in the month of July, 1896, had been made for and on account of W. H. and J. H. Moore.

Said answer further averred that as to the public sale of said 700 shares of Diamond Match stock, on September 22, 1896, referred to in petitioners' bill of complaint, that no sale was in fact made by your petitioners, as alleged in their bill, and that your petitioners did not then have or own said stock, but that the sale which they pretended to make was a mere colorable and fictitious one, to carry out which they borrowed from Schwartz, Dupee & Company, or some one else, certain certificates of stock in the Diamond Match Company, which were loaned to them merely for the purpose of using at such fictitious sale; that they had arranged beforehand to have said stock bid in by some one who should appear to be a purchaser thereof, but who was in fact acting on their behalf; that the sale referred to in the amended bill had been made to this man; that no delivery had been made of the stock to him, nor had any money been paid by him for the stock, nor had any change been made in the situation of any of the parties to said sale, either by transfer of the certificates which had been used for that purpose, or by the payment of any money, or otherwise. And said answer alleged that at said sale there was present a *bona fide* bidder, who had offered to pay for 500 shares of said stock $135 a share, but that your petitioners had refused to sell said stock to him, and had carried out their plan of making a fictitious sale thereof at a lower price, to their agent, at $130 per share.

Said answer further denied that your petitioners suffered damages to the extent of $64,000, as claimed in said bill, or that they had suffered any damage, by reason of the failure or refusal of the respondents to accept and pay for said stock.

Said answer admitted that on the 23rd day of September, 1896, your petitioners notified the respondents of said sale, and of the amount bid for said stock, and that your petitioners proposed to hold the respondents liable for the difference between the price which the petitioners had averred, but which respondents denied, was agreed to be paid by respondents for said stock and the price bid at said auction, and for other damages which your petitioners pretended they had sustained by reason of the respondents' failure to accept and pay for the said stock.

Said answer also admitted that about August 3d the said Schwartz, Dupee & Company deposited with the clearing house of said stock exchange the sum of $11,500, and that the respondents also had deposited the sum of $11,500; but it denied that any deposit had been made by the said Schwartz, Dupee & Company, for or in behalf of your petitioners, and averred that said deposits were made by said Schwartz, Dupee & Company and by the respond-

ents under the rules of said stock exchange, and for the security of the respective members of the said stock exchange connected with the substitution of the said 1150 shares.

Said answer admitted that on the 24th day of September, 1896, the said Schwartz, Dupee & Company requested respondents to consent that the Chicago Stock Exchange pay to the said Schwartz, Dupee & Company $7,000, which they then and there pretended had been deposited on account of the said pretended purchase and sale, and offered to credit the respondents with $7,000; and said answer did not deny that your petitioners joined in the request and offer regarding said deposit by said Schwartz, Dupee & Company.

Said answer further alleged that the only purchase of Diamond Match Company stock made by respondents from the said Schwartz, Dupee & Company, in the month of July, 1896, or August, to be delivered August 31st, or any day in that month, was for fifty shares of stock, and alleged on information and belief that said fifty shares of stock were not sold by the said Schwartz, Dupee & Company for your petitioners.

Said answer further averred that on the 3d day of August, 1896, the Chicago Stock Exchange was closed by order of the governing committee thereof, and so remained closed until the 5th day of November, 1896, and that from the said August 3d to the said November 5, 1896, there were no purchases or sales of securities upon the Chicago Stock Exchange.

Said answer further averred that whatever purchases of stock were made, or agreements to purchase, by the respondents, from said Schwartz, Dupee & Company, acting for themselves, or as agents for your petitioners, had been made in view of, because of, and entirely on account of the constitution, by-laws and rules of the Chicago Stock Exchange.

Said answer further stated that by article 17 of the by-laws of the said Chicago Stock Exchange, of which respondents and Schwartz, Dupee & Company were members, it had been provided as follows:

"Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him shall, after giving notice as required by Section 2 of the preceding article, employ an officer of the board to close the same forthwith in the exchange by purchase or sale as the case may require, unless the price of settlement has been agreed upon by the contracting parties. In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under the rule. In all cases where an officer may be directed to buy or sell securities under this

rule, the name of the member defaulting, as well as that of the member giving the order shall be announced. No order for the purchase or sale of securities under this rule shall be executed unless made out in writing over the signature of the party giving the order, who shall state the reason therefor; and it shall be the duty of the officer who executes the order to endorse thereon the name of the purchaser or seller, the price, and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall within twenty-four hours, ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction; if not, the secretary shall report the default to the president. The duty devolved upon the officers of the exchange under this rule shall be performed without charge. No party shall be permitted to supply offers to buy or sell securities closed for his account under the rule; and when a contract is closed under this rule any action of the defaulter, direct or indirect, by which the prompt fulfillment of such contract is delayed, hindered or evaded to the detriment of the other contracting party, shall subject the offending party to suspension for not less than thirty days in the discretion of the governing committee, by a vote of two-thirds of the members present at the meeting. When contracts are closed out under the rule, any member supplying the bid or offer and not duly receiving or delivering the stock, as the case may be, renders himself liable to prosecution under this article. Should any stock thus sold not be delivered until the next day, the contract shall continue, but the defaulting party shall be liable to pay such damage as may be assessed by the arbitration committee. The same rules as to notice, time and place, that govern defaults in other contracts shall apply to borrowed securities, which on non-delivery or receipt, must be borrowed or loaned in open market, except in case of actual default in receiving or delivering after notice to close the loan; then the same are to be bought or sold, as the case may be, for account of the defaulter in the manner provided in this article."

Said answer further alleged that the notice provided in Sec. 2, of Article 16, and referred to in said Article 17, provided as follows:

"The notice above referred to shall be either personal, or shall be left in writing at the office of the party to be notified, or in case he has no office, then by public announcement, whenever the exchange may be in session."

Said answer further alleged that both buyers and sellers of stock on the stock exchange, were entitled to the protection and advantages afforded by the constitution, by-laws and rules of said stock exchange, and that only upon said stock exchange was it possible in the city of Chicago to obtain a fair or adequate price for

stocks which were covered by contracts of either sale or purchase, made between members thereof. That all contracts for purchase of stock, whether of the Diamond Match Company, or of any other stocks, made between Schwartz, Dupee & Company and the respondents in the month of August, 1896, were made under the by-laws above set forth, and with the agreement that said by-laws should be a part of the contract.

Said answer further alleged that during the time said stock exchange was closed, from the said August 3d until November 5, 1896, there had been no means of carrying out the contracts made between members thereof, for the purchase and sale of stocks and other securities, and that in consequence thereof all purchase contracts had failed, or that settlements thereof must have been deferred until the opening of said stock exchange.

Said answer concluded by submitting to the honorable court, that all and every the matters in your petitioners' bill of complaint mentioned and complained of were matters which might be tried and determined at law, and with respect to which your petitioners were not entitled to any relief from a court of equity.

(12.) The portions of the answer of the governing committee of the Chicago Stock Exchange filed to your petitioners' bill of complaint which your petitioners are advised are material to this application were as follows:

Said answer admitted the formation and purpose of the stock exchange as in your petitioners' bill of complaint set forth and that in the month of July, 1896, they, together with Malcolm M. Jamieson, constituted the governing committee of the said Chicago Stock Exchange.

Said answer further admitted that on or about August 3, 1896, said Schwartz, Dupee & Company had deposited with the clearing house of said stock exchange the sum of $7,000 in trust as security for the faithful performance of a certain contract for the sale of 700 shares of the capital stock of the Diamond Match Company to Jamieson & Company, and that said Jamieson & Company also deposited with said clearing house of said stock exchange the sum of $7,000 to be held by said stock exchange in trust to secure the faithful performance on the part of said Jamieson & Company of their contract to purchase said stock and to pay for the same; that said sums were then in the possession of the governing committee of said stock exchange; that both said Schwartz, Dupee & Company and said Jamieson & Company were then members of said stock exchange, and deposited said sums under the constitution and by-laws of the said stock exchange. There was attached to said answer a copy of said constitution and by-laws marked "Exhibit A," as part of said answer.

(13.) Your petitioners further show unto this honorable court that on the 4th day of May, 1897, on the order of the Hon. John W. Showalter, Circuit Judge, said cause was referred to a master in chancery of said court to take proofs and report the same with his conclusions thereon, and that afterward, to-wit, on the 22d day of January, 1898, said master filed his report; that the master's findings of fact, which your petitioners are advised, are material to this application, were as follows:

"That such rules and by-laws being in force, complainants, on the 16th day of July, 1896, wired their brokers, Schwartz, Dupee & Company, as follows:

'Sell 500 Diamond Match at 220½ for account;' which was done; that later on the same day, said brokers wired complainants as follows:

'Sold 500 Diamond Match at 221⅛ for the account.'

That on the 20th day of July, 1896, said brokers received telegram from complainants, as follows:

'Sell 200 Diamond Match at 221 for the account at opening of market.'

That later on the same day, said brokers wired complainants as follows:

'Sold 200 Diamond Match 221½ for the account.'

That on the 25th day of July, 1896, complainants wired said brokers, as follows:

'Change the Diamond Match over to August account at 2½. If you cannot do it let us know at once.'

That shortly after, on the same day, complainants wired said brokers, as follows:

'You sent us the difference this morning at 2½; at what difference can you do it now.'

That later, on the same day, complainants wired said brokers as follows:

'Change the 500 at 2 cents or better.'

That afterward, and about 12 o'clock on the same day, said brokers wired complainants, as follows:

'Bought Diamond Match 227 for the account; sold 500, 229 account 2d.'

That on July 27th, complainants wired said brokers, as follows:

'Change 200 more Diamond Match 2⅝ or better.'

Later, on the same day, said brokers wired complainants, as follows:

'We changed the 200 Match at 2¼ difference. Will give you price later.'

And, shortly afterward, on the same day, said brokers wired complainant, as follows:

'Bought 200 Match 226¾, account; sold 200 second account 229.'

That these purchases on July account balanced the sales on July account and left the brokers with sales made for complainants of 700 shares of the stock of the Diamond Match Company for the August account; that on the 3d day of August, the clearing department of said stock exchange sent to Schwartz, Dupee & Company, and Jamieson & Company, clearing house sheets, as follows:

'CHICAGO STOCK EXCHANGE,
Clearing Department.

CHICAGO, August 3d, 1896.

Schwartz, D. & Co.:

We have settled all trades on your sheet this day with the following exceptions, which have been substituted:

Bought.	Sold.	Stock.	Price.	Substitution.
	50	W. Chgo.	103¾	Wilson & S.
	150	"	103¾	Wasmansdorff
	1150 Match.		*222*	*Jamieson & Co.*
	100 Bisc.		22	Breeze & Co.
	550 "		92	Spencer.

CHICAGO STOCK EXCHANGE,
Clearing Department.

CHICAGO, August 3, '96.

Jamieson:

We have settled all trades on your sheet this day with the following exceptions which have been substituted:

Bought	Sold.	Stock.	Price.	Substitution.
1150		M.	222	Schwartz.'

That the item '1150 Match 222, Jamieson & Co.,' was made up in part of the 700 shares sold by Schwartz, Dupee & Company, on August account for complainant; that this substitution of Jamieson & Company for the parties to whom such 700 shares had been originally sold was done by the clearing department of said exchange, according to its uniform custom."

"That the method of doing business on said exchange is as follows: At 10 o'clock there is an official call at which the secretary and manager call all the stocks, bonds and securities on the official printed list, and as this call progresses, any member wishing to buy or sell, bids thereon, and the record is made of the transaction; after which there is an irregular call, which closes at half past one, when the manager of the clearing house announces the clearing house or settlement price for the day, which are the closing prices on the exchange for the respective stocks and

securities; that the manager then substitutes trades and sends out cards to all buying or selling on account for the current month, or for the next month; that on the 25th of the month and thereafter until the second day before the end of the month, two calls are made, one for the current month, and one for the next ensuing month, and this is done to allow those who wish to do so to change their accounts over to the next month. That this substitution was made by the clearing department by a system somewhat similar to that employed by the clearing house for banks, that is, that where a broker has purchased and sold during the day the same amount of the same kind of stocks or bonds, his account is balanced by the clearing department, and all margins deposited by such broker may be withdrawn; that when sales and purchases are made by different brokers, one buying and the other selling the same kind of stock or bonds, a substitution is made by the manager of the clearing department, by which it appears that the broker selling has sold such stock, not to the person to whom it was originally sold, but to a person or persons other than those to whom such sales were originally made, and who originally bought of some one else, and that a broker purchasing stock has purchased from some broker other than the broker from whom he originally purchased the same; for instance, if A had sold 100 shares of stock to X, and B has bought the same amount of the same stock from Y, and X and Y's accounts are balanced by other transactions, the substitution would make it appear that A had sold 100 shares to B, and B had bought 100 shares from A, and the names of the parties with whom the original transactions had actually been made by A and B would not appear on the clearing house sheet; that in the transactions on said exchange it is then customary for the parties thus substituted and brought into the relation of buyer and seller with each other by the manager, to assent to the new relations thus formed, and to confirm the transactions as thus adjusted by the manager, and to put up the margins required by the rules, unless margins are already on deposit in the exchange, in which case they are transferred by the manager to the new account."

"That being advised of the substitution on account, as aforesaid, said Schwartz, Dupee & Company, and said Jamieson & Company on said 3d day of August, 1896, exchanged trading cards with each other, on which appears the following:

"CHICAGO, Aug. 3, 1896.

M. Jamieson & Co.:

We hereby confirm sales made by us for the account to-day under the rules of the Chicago Stock Exchange, also substitution trades.

Amt.	Kind of Property.	Price.
	Substitution Trades—Sold.	
1150	Match.	222
	Difference { Collect	
	{ Pay	287 50

(Signed) SCHWARTZ, D. & CO."

"CHICAGO, Aug. 3, 1896.

M. Schwartz:

We hereby confirm purchases made by us for the account to-day, under the rules of the Chicago Stock Exchange, also substitution trades.

Amt.	Kind of property.	Price
	Substitution Trades--Bought	
1150	D. Match.	222
	Difference { Collect	
	{ Pay	287 50

Signed: JAMIESON & CO.

That these cards were handed by the parties receiving them to the clearing house department, so that it appeared at the close of business on said 3d day of August, by the clearing sheet, that Schwartz, Dupee & Company had sold to Jamieson & Company on account, for August, 1150 shares of the stock of the Diamond Match Company, 700 shares of which are the stock in controversy in this case, delivery of which under Rule 2 of the clearing house was to be made on the last day of August, 1896; that Schwartz, Dupee & Company and Jamieson & Company each deposited with the said clearing house seven thousand dollars, as margins on said 700 shares of stock, which amount is still held by the said stock exchange, in trust."

"That on the 3d day of August, 1896, the governing committee, of which defendant Jamieson was then ex-officio president, by virtue of his being then president of said exchange, held a meeting at which the following resolution was adopted, the said defendant, Jamieson, voting in favor of its adoption:

'Resolved, that the exchange adjourn on Tuesday morning, the 4th instant, and remain closed pending further action by this committee.'

That pursuant to said action, said exchange did not open on said August 4th, or thereafter, until the 5th day of November, 1896."

"That on the 31st day of August, 1896, Schwartz, Dupee & Company tendered to Jamieson & Company ten certificates of the stock of the Diamond Match Company for one hundred shares each, and three like certificates for fifty shares each, making 1150 shares of said stock, which said Jamieson & Company examined and refused to receive."

"That when the stock exchange re-opened on the 5th day of November, 1896, Diamond Match stock was sold for cash at 130 and 130½; and that the settlement price for this stock on that day was 129. * * *

"That the lowest price at which said stock has sold since November 5, 1896, was on December 21, 1896, when the price was 108 1-20, and the highest price was on September 17, 1897, when the price was 161½."

"That Jamieson & Company have settled with Schwartz, Dupee & Company for 450 shares of the 1150 shares referred to in the clearing house sheet of August 3, 1897; that such settlement, however, does not include the 700 shares in question in this case."

"That it is admitted by counsel of complainant that the $7,000 put up by Schwartz, Dupee & Company was charged by them to the complainants, and that any claim to that fund which they had has been transferred to complainants; that Schwartz, Dupee & Company have no claim whatever of any kind or character against the $14,000 deposited with said exchange, $7,000 of which was contributed by Schwartz, Dupee & Company, and $7,000 by Jamieson & Company as margins deposited by the parties, respectively, for said 700 shares of Diamond Match stock."

That the master's conclusion of law which your petitioners are advised are material to this application, were as follows :

"That while the contention of defendant's counsel that the constitution, by-laws and rules of the Chicago Stock Exchange are a cunningly devised scheme to enable its members to carry on gambling in stocks and bonds in a systematic manner finds some color in the peculiar methods therein provided for trading and substitution of trades and manipulations of margins, and while gambling transactions may easily be carried on thereunder by disregarding the article forbidding fictitious transactions, yet, as there is no evidence in this case showing, or tending to show, that either of the parties to the original trades or to the substituted contracts, did not intend to deliver and receive the stock of the Diamond Match Company so sold and bought, this transaction can not, under the evidence in this case, be held to be a gambling transaction."

"That by the substitution made in this case, pursuant to the rules of the clearing department, which all the members of the exchange assented to and agreed to be governed by, and by which all

persons directing sales or purchases to be made on said exchange by such brokers are bound, Schwartz, Dupee & Company on the 3d day of August, 1896, sold to Jamieson & Company, and Jamieson & Company bought from Schwartz, Dupee & Company, 1150 shares of the stock of the Diamond Match Company at $222 per share, said stock to be delivered and received on the 31st day of August, 1896, and such contract of sale and purchase was duly ratified by the respective parties on that day, and was thenceforth binding upon both parties to the contract.

"That when substitution of said contract for the sale and purchase of said stock was made, on said 3d day of August, 1896, whereby said Schwartz, Dupee & Company sold, and said Jamieson & Company bought 1150 shares of said stock on the terms aforesaid, there was no legal obligation remaining on the part of the original parties to whom said 700 shares of stock were sold to receive the same from Schwartz, Dupee & Company, or on Schwartz, Dupee & Company to deliver said stock to them; that thenceforth there was a valid and binding contract between Schwartz, Dupee & Company and Jamieson & Company for the sale and purchase of said stock on the terms aforesaid, for the violation of which by either party the other party had its right of action."

"That said complainants, having been the principals for whom said Schwartz, Dupee & Company, as brokers, had sold 700 shares of said stock, which afterward formed a part of the 1150 shares which on the 3d day of August, by substitution and the ratification of both parties, substituted said Schwartz, Dupee & Company sold and said Jamieson & Company purchased for $222 per share, to be delivered and received on the 31st day of August, 1896, said complainants, as such principals, were entitled to maintain an action against said Jamieson & Company for the damages sustained by complainants, because of the refusal of said Jamieson & Company to receive said stock when so, as aforesaid, tendered to them by Schwartz, Dupee & Company."

(14.) Your petitioners further show that the case being further heard on respondent's exceptions to the master's report, and upon certain facts stipulated, your petitioners' bill was, on consideration of said court, dismissed for want of equity. That afterward, to-wit, on the twenty-third day of July, 1898, your petitioners filed a petition for appeal to the Circuit Court of Appeals for the Seventh Circuit, which was duly allowed.

(15.) That, the cause coming on for hearing before said Circuit Court of Appeals on the printed record and briefs of counsel, and on oral arguments, said court afterward, to wit, on the third day of October, 1899, filed its opinion in said case affirming the decree of the Circuit Court, and an order affirming said decree was,

at the October term of said Circuit Court of Appeals, duly entered. A certified transcript of the record in said United States Circuit Court of Appeals is hereto attached, marked Exhibit "A" and made part of this petition.

(16.) Your petitioners further show that in none of the answers, either to your petitioners' bill of complaint or their amended bill of complaint, filed by any of the defendants in said cause, was it charged or intimated that the contract set forth in your petitioners' bill of complaint was a gambling contract, or that your petitioners, or the respondents, Jamieson & Company, had agreed to settle according to differences of price, or that they, or either of them expected so to do. Nor was there any issue of the kind made before the master, nor was there any testimony in the case taken with reference to such an issue; and your petitioners show unto this honorable court that not until the testimony in said case was closed and argument thereon had before the master, were your petitioners apprised or advised that it would be pretended by the respondents that said contract was a gambling contract. Nevertheless, in response, not to any issue made by the pleadings in said cause, but only to the oral argument of counsel for the respondents, the master found that the transaction involved was not a gambling transaction.

(17.) That the finding of the master in this regard was, in effect, affirmed by the Circuit Court, the opinion of his honor, Judge Grosscup, before whom said cause was heard on exceptions to the master's report, reading as follows:

"There can be no question that there came into existence by the transactions stated a contract, whereby, primarily between Schwartz, Dupee & Company and the defendants (being respondents herein) the latter were obliged to purchase of the former, and the former were obliged to sell to the latter, during the month, seven hundred shares of this stock at the price of $222 per share." (See transcript, p. 94.)

Said opinion further declaring as follows:

"The only question is whether complainants (being the petitioners herein) were parties principal to the contract between Schwartz, Dupee & Company and the defendants" (being the respondents herein).

And your petitioners show unto this honorable court that his honor, Judge Grosscup, after declaring the binding force and legal obligation of said contract as between the parties in whose names it was made, to wit, Schwartz, Dupee & Company and the respondents, nevertheless held that your petitioners were not parties principal to the contract between Schwartz, Dupee & Company and the respondents, inasmuch as the evidence disclosed that your peti-

tioners' authority to their said brokers was to sell seven hundred shares of Diamond Match stock at $229 per share, whereas the contract between Schwartz, Dupee & Company and the respondents was for the sale of seven hundred shares of Diamond Match stock at $222 per share, ignoring that by and under the daily novations, customs and methods of said exchange the contract at $222 per share superseded the contract at $229 per share, and that the difference had been paid in money.

And your petitioners aver that the sole and only ground which the trial court in its opinion alleged as sufficient ground why your petitioners should not recover against the respondents, was the alleged want of privity of your petitioners in the contract between the respondents and said Schwartz, Dupee & Company, and that this was the only point discussed or decided by the trial judge.

(18.) That upon argument before the Circuit Court of Appeals, aforesaid, on the appeal of this case to said court, the principal point argued was the said question of privity, counsel for respondents not having raised the question of gambling in their brief filed in said court, and only by way of innuendo in their oral argument before said court. Nevertheless said Court of Appeals, without passing upon the question of privity or any other question raised by the pleadings or arguments in said case, handed down its opinion wherein it affirmed the decree of the Circuit Court, declaring of its own motion as the sole and only reason for such affirmance, that the transaction out of which arose the controversy was a gambling transaction, against public policy, against the statutes of the State of Illinois, illegal and void.

(19.) That the contract in question differed in no particular whatever from innumerable contracts theretofore executed under and in pursuance of the customs, rules and regulations of the Chicago Stock Exchange, and that the rules, customs and regulations of said stock exchange and its methods of executing contracts made in pursuance thereof, differ not at all in principle from the rules, customs, regulations and methods of stock exchanges the world over, and that the particular transaction was in strict conformity with such rules, customs and methods, save only in this, to wit: that because of the closing of said Chicago Stock Exchange on the fourth day of August, by resolution of its managing board, and because being so closed on the thirty-first day of August, 1896, when, under their contract, respondents had agreed to receive and pay for the shares of stock bought by them, your petitioners had recourse to the courts for redress instead of submitting their grievances to the board of arbitration appointed by said stock exchange.

(20.) And your petitioners further show unto this honorable

court that so far as they are aware, or have been able to discover, this is the only case wherein the machinery, methods and customs of the stock exchange clearing house as an institution have been made the subject of judicial investigation in the United States; although in England several cases have grown out of transactions on the London Stock Exchange differing not at all in principle, as your petitioners believe, from the case at bar, and wherein similar customs have been upheld, as reasonable and just; holding further that the process of novations and substitutions growing out of such customs result in a privity of contract between the original seller or purchaser and the ultimate seller or purchaser. Which said English decisions your petitioners, by their counsel, duly presented to both the Circuit Court and the Circuit Court of Appeals, aforesaid, but to which neither of said courts made reference in their opinions.

(21.) That the Circuit Court and the Circuit Court of Appeals have erred as to the law and the facts, and that in law and in fact your petitioners were privy to the contract entered into on their behalf on the third day of August, 1896, by said Schwartz, Dupee & Company with the respondents; and that, in any event, they had ratified and adopted said contract, and were therefore legally entitled to enforce the same, and that the testimony so far from revealing an intention on the part of any one connected with such transaction to gamble (by mutually agreeing not to deliver the shares of stock contracted for but to settle therefor according to the differences in price), shows that no such intention could, by any possibility, have existed, if for no other reason than that until the day of delivery the real parties in interest, to wit, your petitioners and the said W. H. & J. H. Moore were wholly unknown to each other. Although your petitioners respectfully submit that where the question of gambling depends upon intention, such intention is a question of fact to be duly pleaded and found as a fact upon testimony directed to the issue thus raised; further insisting that the specific finding of the master, concurred in by the trial court, that the particular contract out of which arose this controversy was not gambling, ought, in the absence of error of law or mistake in evidence, to be binding on a court of appellate jurisdiction.

(22.) That the questions upon the legal and just construction and effect of the rules, customs and regulations of the Chicago Stock Exchange involved in and presented by the said case of your petitioners, should be authoritatively and finally adjudged by this honorable court upon and after a full presentation to the court of the merits of the said questions upon the part of your petitioners and the respondents.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Seventh

Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled *Henry Clews, Charles M. Foster and James B. Clews, appellants*, v. *Malcolm M. Jamieson, Roland C. Nickerson, Harry F. Billings, Edwin G. Foreman, Charles Henrotin et al. respondents*, No. 533, to the end that the said case may be reviewed and determined by this court as provided in Section 6 of the act of Congress, entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioners may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this honorable court.

And your petitioners will ever pray, etc.

HENRY CLEWS,
CHARLES M. FOSTER and
JAMES B. CLEWS,
By FRANK O. LOWDEN.
HENRY D. ESTABROOK,
HERBERT J. DAVIS,
Counsel for Petitioners.

HENRY D. ESTABROOK,
Of Counsel for Petitioners.

UNITED STATES OF AMERICA, }
STATE OF ILLINOIS, } ss.

Henry D. Estabrook being duly sworn, says that he is one of the attorneys and of counsel for Henry Clews, Charles M. Foster, and James B. Clews, petitioners above named, and as such had personal charge for them of the case in the foregoing petition mentioned, in the Circuit Court of the United States for the Northern District of Illinois, Northern Division, and in the United States Circuit Court of Appeals for the Seventh Circuit; that he has read the foregoing petition by him subscribed; and that the facts therein stated are true to the best of his information and belief.

Subscribed in my presence
and sworn to before me, this
—day of March, A. D. 1900.

BRIEF AND ARGUMENT.

STATEMENT OF ISSUES.

This suit in equity was brought by the petitioners, Henry Clews & Company, citizens and residents of the State of New York, engaged in the business of buying and selling stocks, bonds and other securities, to have administered and turned over to them fourteen thousand dollars in the possession of the managers of the Chicago Stock Exchange, claimed by petitioners to have been deposited in trust as security for the performance of a contract, entered into August 3, 1896, whereby the petitioners agreed to sell and deliver, and the respondents, Jamieson & Company, citizens and residents of Chicago, Illinois, agreed to receive and pay for, on the thirty-first day of August, 1896, seven hundred shares of the stock of the Diamond Match Company; which contract, it was alleged, Jamieson & Company failed and refused to perform. Petitioners' bill also asked for an accounting of the loss and damages sustained by them on account of the breach of contract, and that Jamieson & Company be decreed to pay to the petitioners the amount ascertained.

It was contended by the respondents, Jamieson & Company:

1. That the contract sued upon was in reality a contract between Jamieson & Company and Schwartz, Dupee & Company, a firm of brokers, citizens and residents of Chicago, Illinois, to which the petitioners, Henry Clews & Company, were not parties and upon which they ought not to recover for want of privity.

2. That the contract sued upon was made through the clearing house of the Chicago Stock Exchange and according to the rules, customs and regulations of said exchange, which said rules provided, among other things, a remedy for breach of every contract made subject thereto, and that the remedy so provided was exclusive.

3. That the testimony offered by petitioners, Henry Clews & Company, proved, at most, nominal damages only.

4. That a bill in equity would not lie, the petitioners having an adequate remedy at law.

The fourth issue specified was raised on demurrer to the bill, which demurrer was overruled and the case was sent to a master to report his findings of fact and conclusions of law. The master's report found all the issues in favor of the petitioners, Henry Clews & Company, and that there was due them from Jamieson & Com-

pany, $64,400. On exceptions to the master's report, and certain new evidence stipulated into the record, the trial judge dismissed the bill of petitioners for want of equity, although his written opinion, set forth in the record, bases the decision solely on the ground of want of privity.

5. On appeal to the United States Circuit Court of Appeals for the Seventh Circuit, the decision of the Circuit Court was affirmed, *not on the only ground which formed the basis of the opinion of that court, nor upon any issue raised by the pleadings or argued in the brief of counsel for respondents*, but because, in the opinion of the Circuit Court of Appeals, the transaction was a gambling transaction and therefore void; leaving petitioners to recover from the stock exchange, as best they might, their money on deposit.

6. The only points discussed in this brief will be the question of privity and the question of gambling.

Statement of Facts and Comments Thereon.

On August 3, 1896, the manager of the clearing house sent to Schwartz, Dupee & Company, a firm of brokers in Chicago, Illinois, members of the Chicago Stock Exchange, a CLEARING HOUSE SHEET, reading as follows:

CHICAGO STOCK EXCHANGE CLEARING DEPARTMENT.

CHICAGO, AUG. 3, 1896.

Schwartz, D. & Co.:

Tr. p. 120. We have settled all trades on your sheet this day, with the following exceptions, which have been substituted :

Bought.	Sold.	Stock.	Price.	Substitution.
	50	W. Ch'go.	103¾	Wilson & S.
	150	" "	103¾	Wasmansdorff.
	1150	*Match.*	*222*	*Jamieson & Co.*
	100	Bisc.	92	Breese & Co.
	550	"	92	Spencer.

The manager at the same time sent a CLEARING HOUSE SHEET to Jamieson & Company reading as follows:

CHICAGO STOCK EXCHANGE
Clearing Department.

Chicago, August 3, 1896.

Tr. p. 109. *Jamieson:* We have settled all trades on your sheet this day with the following exceptions, which have been substituted:

Bought.	Sold.	Stock.	Price.	Substitution.
1150		M	222	Schwartz.

PAGE CUT OFF

On the same day Schwartz, Dupee & Company delivered to Jamieson & Company a TRADING CARD reading as follows:

Chicago, Aug. 3, 1896.

M. Jamieson & Co.

We hereby confirm *sales* made by us for the account to-day under the rules of the Chicago Stock Exchange, also substitution trades. Tr. p. 132.

Amt.	Kind of Property. Substitution Trades. Sold.	Price.
1150	Match.	222
	Difference { Collect	287 50
	Difference { Pay	

SCHWARTZ, D. & Co.

The same day Jamieson & Company delivered to Schwartz, Dupee & Company a TRADING CARD reading as follows:

CHICAGO, Aug. 3, 1896.

M. Schwartz: Tr. p. 133.

We hereby confirm *purchases* made by us for the account to-day under the rules of the Chicago Stock Exchange, also substitution trades.

Amt.	Kind of Property. Substitution Trades.	Bought.	Price.
1150	D. Match.		222
	Difference { Collect		
	Difference { Pay		287 50

JAMIESON & Co.

EXPLANATION: The words "FOR THE ACCOUNT" used in the foregoing documents are technical words. They mean that the shares of stock bought or sold are to be delivered on the account day, *which, under the rules of the exchange, was the last day of the current month.* Tr. p. 38, clearing house rules, Sec. 2.

All trading for "the account" in securities listed on the Chicago Stock Exchange (*i. e.*, every contract for future delivery), was under the rules of the clearing house. Idem, Sec. 1.

On all trades for "the account" the buyer and seller were each required to deposit with the stock exchange clearing house a "margin" of $10 per share on all stocks selling at $100 or over per share, as a trust fund to secure the mutual performance of the contract entered into. Idem, pp. 40 and 41, Secs. 12 and 17.

This trust fund was at all times to be kept unimpaired regardless of the fluctuations of the market, to do which necessitated additional deposits from one of the parties to the contract from day to Tr. p. 37, Art. 16 of the by-laws, Sec. 1; also §§ 2-6, p. 39.

COPY BOUND CLOSE IN CENTER

day, and of course justified the other party in withdrawing from such fund an amount equal to the deposit.

ILLUSTRATION: A agrees to sell and B to buy 700 shares of Diamond Match stock at $223 per share. They each deposit $7,000, *i. e.*, $10 per share. The day following the making of this contract, however, the market price of Diamond Match falls to $222 per share. A's contract, therefore, is potentially worth $1 a share less, and B's is potentially worth $1 a share more than on the previous day. To make good his security, A thereupon deposits $1 per share, *i. e.*, $700, in the trust fund. B, who is only required to keep his security unimpaired, thereupon withdraws $1 per share, *i. e.*, $700, from the trust fund. If on the following day the market returns to $223, B deposits $1 per share, *i. e.*, $700, and A withdraws $1 per share, *i. e.*, $700.

Tr. p. 133, testimony of Wilkins, Mgr. of the Exchange.

This illustration also explains the meaning of the words and figures under the heading "Price" in the foregoing trading cards. The card signed Jamieson & Company indicates that Jamieson & Company were required to pay $287.50 into the trust fund to make good their margin, and the card signed Schwartz, D. & Co. indicates that Schwartz, D. & Co. were at liberty to withdraw from the trust fund $287.50. It is apparent that the figures $287.50, register the fluctuations of the market during the preceding twenty-four hours.

THERE IS NO DISPUTE AS TO THE MEANING OF THESE DOCUMENTS.

Mr. Wilkins, manager of the stock exchange, asked to translate these cards, says, as to the one signed S. D. & Co.: "That card would show that they [Schwartz, Dupee & Company] had no sales and they accepted the substitution which I had given them for 1150 shares of Match at 222, and they [Schwartz, Dupee & Co.] *collected* $287.50."

Tr. p. 133.

As to the card signed Jamieson & Company, Mr. Wilkins says: "That is exactly the same as exhibit 6, except that they [Jamieson & Company] *paid* $287.50. * * * That is, Jamieson & Company say that they have bought 1150 shares of stock at 222 and *paid* $287.50; Schwartz, Dupee & Company say that they have sold 1150 shares of Match at 222 and *collected* $287.50; that balances the stock and balances the money."

Idem, p. 133.

One further explanation is perhaps called for at this time, to be more fully developed hereinafter, as to the meaning of the words "SUBSTITUTION TRADES." Their meaning is indicated in the testimony of Mr. Wilkins quoted. The cards show that neither Schwartz, Dupee & Company nor Jamieson & Company had made any new original sales on August 3, 1896; that the 1150 shares of Diamond Match stock bought and sold by them had been so bought and sold prior to August 3, 1896. They further indicate that the

persons, members of the exchange, to whom Schwartz, Dupee & Company had theretofore sold 1150 shares of Diamond Match stock might be, and probably were, other than Jamieson & Company; and that the persons from whom Jamieson & Company had theretofore purchased 1150 shares of Diamond Match stock might be, and probably were, other than Schwartz, Dupee & Company, *but that irrespective of who such former buyers and purchasers were, the manager of the exchange had novated the contract* by substituting for the persons purchasing from Schwartz, Dupee & Company, whoever they might be, Jamieson & Company, and by substituting for the vendors from whom Jamieson & Company had purchased, whoever they might be, Schwartz, Dupee & Company, *and that both Schwartz, Dupee & Company and Jamieson & Company had assented to the substitution*, THEREBY CANCELING ALL FORMER CONTRACTS WITH WHOMSOEVER MADE AND AT WHATSOEVER PRICE, AND ENTERING INTO A NEW CONTRACT, DATED AUGUST 3, 1896, BY THE TERMS OF WHICH JAMIESON & COMPANY AGREED TO PURCHASE UNDER THE RULES OF THE EXCHANGE 1150 SHARES OF THE STOCK OF THE DIAMOND MATCH COMPANY FROM SCHWARTZ, DUPEE & CO.; THAT THEY AGREED TO RECEIVE SUCH STOCK ON THE 31ST OF AUGUST, 1896, AND PAY THEREFOR THE SUM OF $222 PER SHARE; THAT SCHWARTZ, DUPEE & COMPANY HAD SOLD TO JAMIESON & COMPANY UNDER THE RULES OF THE EXCHANGE, 1150 SHARES OF DIAMOND MATCH STOCK, WHICH THEY THEN AND THERE AGREED TO DELIVER TO JAMIESON & COMPANY ON THE 31ST DAY OF AUGUST, 1896, FOR $222 PER SHARE.

In other words, the cards construed together, and according to the rules, customs and methods of the Chicago Stock Exchange, evidence a contract, *that day executed*, between Jamieson & Company and Schwartz, Dupee & Co., but which was a novation, or a contract substituted for a contract of the day before, to which either Schwartz, Dupee & Co. or Jamieson & Co., or possibly both, had been parties.

[The stipulation of facts entered into after the coming in of the master's report, and to which reference has been made, is simply an attempt to trace from the private books of the brokers, the daily substitutions merging into the contract of August 3.] Tr. p. 76, et seq.

Of this new or substituted contract, his honor, Judge GROSSCUP, in delivering the opinion of the Circuit Court, said: Tr. p. 94.

"There can be no question that there came into existence by the transactions stated a contract, whereby, primarily between Schwartz, Dupee & Company and the defendants (respondents), the latter were obliged to purchase of the former, and the former were obliged to sell to the latter, during the month, seven hundred shares of this stock at the price of 222 per share.

Nor can there be any doubt that the undisclosed principals of

either of these parties were entitled to step into the place of these respective brokers, and in their own name, and for their own benefit, insist upon the enforcement of the contract according to its terms. Clearly, under the rules of the exchange, each of the brokers bound himself, both to the other broker and to the principal whom the broker represented, to carry out the terms of the contract.

The only question is whether the complainants (petitioners) were parties principal to the contract between Schwartz, Dupee & Co. and the defendants. The evidence discloses that their authority to the brokers was to sell seven hundred shares of this stock at 229; and while the authority to sell for more than this might be implied, authority to sell for less could certainly not be. They were entitled, under their contract with Schwartz, Dupee & Company, to a purchaser at 229, or more; they were bound to no sale at a figure less. Neither Schwartz, Dupee & Company, nor any persons with whom that firm had contracted, could have compelled the complainants to deliver the stock at a price less than 229.

But the contract between Schwartz, Dupee & Company and the defendants was for the sale of seven hundred shares at 222. Under the contract between the brokers, the defendants (respondents) could have demanded a conveyance at 222. But of whom could they have made such demand? Certainly not from complainants (petitioners).

Their contract was for 229, and no less.

The devices of the exchange for clearing and counterbalancing accounts between brokers could not, *without their consent*, change so essential a term of the complainants' (petitioners) sale. It can not be that authority from a principal to sell at 229 can, *without his conscious assent*, be transformed into authority to sell at 222. The original understanding that the sale should be made under the rules and practice of the stock exchange can not be interpreted to give such elasticity to the all-important feature of price. *Who would deal on the exchange as principal if it were understood that the prices named had no fixity; that the obligation might be one thing to-day and another totally different thing to-morrow?* While the substitutions, resulting in prices unquestionably different from those originally authorized, bind the brokers participating, they do not, *in the absence of assent*, reach over so as to change the contract rights of the principals. To hold otherwise would be to abolish, by judicial pronouncement, the authority on the faith and stability of which every transaction on the exchange is grounded.

But if the defendants (respondents) under the substitution, could not hold the complainants (petitioners) as principals to the contract for the sale at 222, then for want of mutuality the com-

plainants (petitioners) are in no position to hold the defendants (respondents). There is, indeed, no identity of contract between the one the complainants (petitioners) authorized and the one entered into between Schwartz, Dupee & Company and the defendants (respondents). *That the complainants (petitioners) now choose to accept it is of no significance;* the legal fact remains that they are not so bound, and not being so bound, the defendants (respondents) on their part, are not legally bound.

Whatever legal obligation the defendants (respondents) owe is, under the contract of substitution, to Schwartz, Dupee & Company alone. Between the complainants (petitioners) and the defendants (respondents) there is no privity, and, therefore, no enforceable obligation.

For the foregoing reasons the bill must be dismissed."

The undisputed testimony of Mr. Comstock, connected with the firm of Schwartz, Dupee & Company, in explanation of the clearing house sheet dated August 3, 1896, is as follows: Tr. p. 121.

"Q. Mr. Comstock, on this clearing house sheet appears on line 3, the following: 'Sold 1150 Match 222 Jamieson;' will you state what that 1150 included? A. What it included?

Q. Yes. A. Well, it included the 700 Match sold for Clews & Company and 450 more for other clients."

Cross-examination waived.

It is undisputed testimony also, that on September 9, 1896, Schwartz, Dupee & Company wrote and delivered to Jamieson & Company the following letter: Testimony of Billings, one of the respondents, Tr. p. 107.

"CHICAGO. September 9, 1896.

Messrs. Jamieson & Company, 187 Dearborn St., Chicago, Illinois.

DEAR SIRS: On August 31, 1896, we tendered you seven hundred (700) shares of Diamond Match stock in settlement of sales made by us. The sales made were 500 shares July 25th, and 200 shares July 27, 1896, you being substituted through the clearing house of the Chicago Stock Exchange August 3, 1896, as the purchaser of said stock.

This is to notify you that said sales were made by us as agents for Henry Clews & Co., of New York, who may rightfully take any proceedings to enforce the contracts for said sales, and who are authorized to make settlement thereof.

Very truly yours,

SCHWARTZ, DUPEE & CO."

That on the 10th of September, 1896, Henry Clews & Company, by their attorneys, wrote and delivered to Jamieson & Co. the following letter: Testimony of Billings, Tr. pp. 106 and 107.

"SEPTEMBER 10, 1896.

Messrs. Jamieson & Company, No. 187 Dearborn street, Chicago:

DEAR SIRS—This is to notify you that on Tuesday, the 15th day of September, 1896, at one o'clock P. M., we shall offer for sale, at public auction, to the highest bidder, for cash, at the judicial salesrooms of the Chicago Real Estate Board, No. 57 Dearborn street, in the city of Chicago, county of Cook and State of Illinois, seven hundred (700) shares of stock of the Diamond Match Company, and at said time and place will sell the same to the highest bidder for cash. Said sale will be made for your benefit on account of your contracts with Schwartz, Dupee & Company on the Chicago Stock Exchange for the purchase by you of said shares, *in which contracts the said Schwartz, Dupee & Company were acting as agents of the undersigned*, said shares of stock having been tendered you by Schwartz, Dupee & Company in fulfillment of said contracts on the 31st day of August, 1896.

You are further notified that should said stock at said sale sell for less than the amount due from you on said contracts we will look to you to settle the difference, and we will hold you responsible for any loss on account of said contracts.

The contracts of sale referred to herein are the same mentioned in the letter of Schwartz, Dupee & Company accompanying this notice.

In the meantime we hold said stock ready for delivery to you upon payment of the amount due from you under said contracts of purchase.

Very truly yours,
HENRY CLEWS & CO.,
By Estabrook & Davis,
Their Attorneys."

That other correspondence took place among the parties, set forth in the testimony of said Billings, wherein, prior to the commencement of this suit, Jamieson & Company were informed and advised that Schwartz, Dupee & Company acted for and on behalf of petitioners in the sale of August 3, and that, as principals to said contract, petitioners had ratified and confirmed the same.

We will have occasion to question the legal conclusions of the trial judge from the facts postulated in his opinion; but his statement of facts requires some modification to conform to the evidence in the case.

For instance: Nowhere in the record is there any testimony that Henry Clews & Company *in so many words* authorized their agents, Schwartz, Dupee & Company, to sell Diamond Match stock at $229 per share. It is true that on July 25, 1896, in answer to the request of Henry Clews & Company to change their sales of

Diamond Match from the July to the August account, Schwartz, Dupee & Company *notified* them that they had "bought in" 700 shares of the stock for the July account and had sold 700 shares at $229 per share for the second or August account, and by acquiescing in this sale, of which they were duly notified as aforesaid, they may be said to have authorized it. But the only sales authorized by Henry Clews & Company *in which a specific price was named*, were *prior* to the sale for $229 per share, to wit, on the 16th and 20th of July, 1896, and the prices then named were *less* than $229 per share, to wit, $220½ and $221; *and that which gives significance to all these sales, and which the trial judge apparently lost sight of, is the fact that the sale at $229 per share on July 25, 1896, and the sale at $222 per share on August 3, were different phases of the same transaction, having its origin July 16 and 20. They represent the usual and ordinary mutations of every sale or purchase for "the account" under the rules, customs and usages peculiar to the stock exchange.*

On the 16th day of July, 1896, at 11:19 A. M., Schwartz, Dupee & Company received the following order from Henry Clews & Company by telegram: Tr. p. 117.

"Sell 500 Diamond Match at 220½ for acct.

(Signed) HENRY CLEWS & COMPANY."

On the same day, at 11:35 A. M., Schwartz, Dupee & Company telegraphed Henry Clews & Company as follows:

"Sold 500 Diamond Match at 221⅛ for the account.

(Signed) SCHWARTZ, DUPEE & Co."

On the 20th of July, 1896, at 9:23 A. M., Schwartz, Dupee & Company received a telegram reading as follows: Tr. p. 117.

"Sell 200 Diamond Match at 221 for the account at opening of market. They want put out at opening if possible, but it is good all day.

(Signed) CLEWS."

On the same day at 10:08 A. M., Schwartz, Dupee & Company telegraphed Clews as follows:

"Sold 200 Diamond Match 221½ for the account.

(Signed) SCHWARTZ, DUPEE & Co."

The foregoing is the only correspondence which took place between the petitioners and their brokers, Schwartz, Dupee & Company, until July 25, when Schwartz, Dupee & Company received the following telegram:

"Change the Diamond Match over to August account at 2½ per cent. If you can not do it let us know at once.

(Signed) CLEWS."

Tr. p. 118.

On the same day, at 11:58 A. M., Clews telegraphed Schwartz, Dupee & Company as follows:

"Change the 500 at two cents or better.

(Signed) CLEWS."

On the same day, at 12:11 P. M., Schwartz, Dupee & Co., telegraphed Clews as follows:

"Bought Diamond Match 227 for the account.
Sold 500 229 account 2nd.

(Signed) SCHWARTZ, DUPEE & Co."

On July 27, at 8:55 A. M., Clews telegraphed Schwartz, Dupee & Company as follows:

"Change 200 more Diamond Match 2 per cent or better.

(Signed) CLEWS."

On the same day, at 10:53 A. M., Schwartz, Dupee & Co. telegraphed Clews as follows:

"We changed the 200 Match at 2¼ difference. Will give you prices later.

(Signed) SCHWARTZ, DUPEE & Co."

On the same day. at 10:55 A. M., Schwartz, Dupee & Company telegraphed Clews as follows:

"Bought 200 Match 226¾ account. Sold 200 2nd account 229.

(Signed) SCHWARTZ, DUPEE & COMPANY."

The record shows no other correspondence to have taken place between Clews & Company and Schwartz, Dupee & Company.

Tr. p. 119.

It was stipulated in writing that the orders of Henry Clews & Company, and Schwartz, Dupee & Company contained in the foregoing messages were, as a matter of fact, *executed as set forth in the aforesaid messages from Schwartz, Dupee & Company on the Chicago Stock Exchange.*

EXPLANATION: From the foregoing testimony it is evident that Henry Clews & Company had sold for future delivery 500 shares of the stock of the Diamond Match Company at $221⅛ and 200 shares of said stock at $221½, making a total sale of 700 shares at an average price of more than $221 per share; that they had purchased 500 shares of the same stock for $227 per share and 200 shares of the same stock at $226¾ per share.

If we assume that the brokers of Henry Clews & Company had sold for them the 700 shares of Diamond Match stock to A at $221 for delivery July 31, and had purchased 700 shares of Diamond Match stock from B at $227 per share for delivery July 31, it might save time and trouble if the same broker would, on July 31, bring A and B together, instead of having B deliver to Clews & Company

and the latter deliver to A. And this would obviously be so if A and B were brokers and members of the exchange operating for undisclosed principals.

The stock exchange clearing house is designed for the purpose of facilitating just such transactions and for no other purpose.

We have already pointed out the necessity of a deposit of $10 a share as a trust fund on all shares bought or sold. It follows, therefore, that when on the 16th day of July, 1896, Schwartz, Dupee & Company sold for Henry Clews & Company 500 shares of the stock of the Diamond Match Company for $221 per share, they deposited for and on account of Henry Clews & Company $5,000, and on their sale of 200 shares July 20, they deposited $2,000; but between July 20 and July 25 the market price of this stock appears to have advanced from $221 per share to $227 per share—a potential loss to Henry Clews & Company of $6 per share; therefore Schwartz, Dupee & Company must have deposited in the trust fund between July 20 and July 25, $4,200, in addition to the $7,000 originally deposited.

On and after the 25th day of any month, however, the rules of the Chicago Stock Exchange permit the trading in what is known as the "second account," which, in the case at bar, would be the August account. Mr. Wilkins, manager of the exchange, explains the process of changing from one account to another as follows: Tr. p. 124.

"From the 25th day of any month up to the day before delivery day, which is the day before the end of the month, I call two accounts, first account and second account. The first account is the account of the present month, which in that case would be July; the second account would have been the next account, which would have been August; then on the day before the last day of the month that stops and you go right on to the one account, which is August. Tr. pp. 124 and 125.

Q. These changes or transfers take place then, at what time in the month? A. Any time after the 25th.

* * * * * * * *

Q. Assuming, Mr. Wilkins, that on the 25th day of July, 1896, at 11:41 A. M., a telegraphic order is received from a party in New York by a broker in Chicago, member of the stock exchange, in these words: 'Change the Diamond Match over to August account at two and a half per cent; if you can not do it, let us know at once.' Please explain to the master what is meant there by the two and a half per cent, according to the rules and customs and nomenclature of the stock exchange?

JUDGE MCCONNELL: Objected to. Tr. p. 125; testimony of Wilkins.

A. It would mean that the 500 shares of stock which they had sold for their July account they did not wish to deliver on the

last day of the month, therefore they went in and bought it in for one party and sold it out again for the August account, keeping themselves short the same amount of stock and making that difference, which they would, or at least what they wanted to make, two and a half—what they would make, I don't know.

Q. What is the two and a half per cent? A. Two dollars and a half a share, $250 on every 100 shares of stock for changing, for carrying the stock for another broker for another month.

Q. That would be compensation or commission? A. Interest.

Q. It is the compensation or brokerage of the — A. Hardly called brokerage.

Q. Or commission of the broker? A. It is what one party who has 500 shares of stock—one broker who has 500 shares of stock that he is carrying for a customer and that customer is not prepared to take it up and he is perfectly willing to pay whatever anybody else, who is on the other side of the market will do it for, for carrying it for thirty days.

Q. Supposing, Mr. Wilkins, that a sale of stock is made on the exchange on the 16th day of July, on account; the person who purchases is known at that time to the officers of the exchange, is he? A. Yes, sir; you mean if it is made publicly on the exchange?

Q. I mean if it is made on the floor of the exchange. A. Yes, sir.

Q. Would that person necessarily be the purchaser of that stock or the responsible purchaser of that stock on the account day of that month?

Tr. p. 126; testimony of Wilkins.

JUDGE MCCONNELL: I object to that especially because it involves an expression of a legal opinion; and I stand on that objection.

THE MASTER: Let it go in subject to the objection.

A. No, sir.

Q. All sales or purchases for the account are made through the clearing house as I understand it, to which you have referred? A. All trades made for the account must go through the clearing house."

After the witness is interrogated as to his authority for making substitutions he is asked:

"Q. Please explain to the master and myself the working of that rule. A. It simply says—I can say what it says myself, so as to have what may follow come in line with it. It says that the manager shall borrow or loan stock; it means to say that if you are a member of the Stock Exchange and put in a clearing house sheet on one morning, and in balancing that sheet you are 500

shares—you show that you are 500 shares of Diamond Match long, [*i. e.*, bought], you put that sheet in, and by putting that in with the sheet in the condition it is, it is taken as authority for the manager of the clearing house to borrow that stock for you from somebody else; *that is what the clearing house is for, to save the broker the bother of doing that business himself.* The judge might be another member of the exchange; he might put in a sheet showing that he was short [*i. e.*, sold] 500 shares of Diamond Match, in other words, just the opposite to what you would be, or there might be five different brokers on the floor, each putting in a sheet 100 shares short. If you are long, the manager of the clearing house through his clerks takes every sheet; the sheets must all balance or else the business stops and don't go on until it does balance; so that the stock and differences must balance every day before the summary is made up; therefore, if you are 500 shares of stock long on Diamond Match, there must be somebody in that clearing house who is 500 shares of stock short, or the sheets wouldn't balance; therefore the manager of the clearing house borrows from you, who may be long 500, to supply the judge, if he is short [illegible] or to supply five other men who are short 100 each, and in doing [illegible]t the summary is made up, and they get that notice which you have just referred to.

Tr. pp. 128 and 129; testimony of Wilkins.

Q. That, in effect, Mr. Wilkins, results, does it not, in the substitution from time to time, or from day to day, as the case may be, of a different purchaser or buyer of stock? A. It may or it may not."

COMMENT.

Taking the telegrams of Henry Clews & Company of July 25, and the testimony of Mr. Wilkins together, and we have an example of how a person who has contracted to deliver a number of shares of stock on the account day, is enabled to make an extra profit by granting an extension of time for delivery to the second account day.

ILLUSTRATION: If A, who has agreed to purchase 700 shares of stock and pay for them $227 per share on the 31st day of July, is obliged to borrow money of the bank to meet his obligation he would, ordinarily, be required to pay interest on the money borrowed, hypothecate the shares of stock purchased, and in addition pledge a large amount of collateral. If, therefore, he can induce the vendor to extend the time of delivery thirty days by agreeing to pay him $2 per share extra (for instance), he would, perhaps, prefer to do so, rather than to borrow of the bank. The process is accomplished on the stock exchange by the vendor buying of the vendee at the

contract price and forthwith agreeing to sell him the same number of shares for the second account at the advanced price agreed upon. Mr. Wilkins, in his testimony, denominates this compensation "interest," in analogy, possibly, to what a banker would call it were the same result accomplished by a loan from the bank. We should presume that, legally speaking, it would be a new consideration for an agreement to extend the time of performance. The case we have supposed is an ideal one. In practice, the repurchase by the vendor may be from A and the resale to B through substitutions made by the manager of the clearing house.

Applying the facts evidenced by the telegrams of July 25 to the case at bar and we have:

1. The expressed willingness on the part of Henry Clews & Company to have the time of delivery of the 700 shares of Diamond Match stock sold by them, extended from July 31, that is, from the first account to the second account.

2. Provided, however, that they were paid a certain price for the accommodation.

3. That the 25th of the month was the first day under the rules when such an accommodation could be asked for or would be permitted.

4. That the brokers of Henry Clews & Company were authorized to grant such an extension of time for not less than 2 per cent par value of the stock, *i. e.*, $2 per share.

5. That unless this price or better could be obtained for the accommodation, the purchaser would have no alternative but to accept the stock to be tendered on the 31st, or take the consequences of a breach of contract.

6. That the purchaser was, as a matter of fact, willing to pay the extra compensation and the change was effected by Schwartz, Dupee & Company buying 700 shares of the Diamond Match Company stock at $227 per share for the first account and selling 700 shares of Diamond Match stock at $229 per share for the second account.

7. That the effect of this transaction was to cancel the obligation of Henry Clews & Company to deliver 700 shares of the stock of the Diamond Match Company on July 31 at $221 per share and left them obligated to deliver the same number of shares of said stock on August 31 at $229 per share; that this novation had been brought about in the ordinary course of dealing and had required a cash advance by Henry Clews & Company, or their brokers, Schwartz, Dupee & Company, of $4,200, being the difference on 700 shares of stock between $221 per share, the price sold for on July 16 and 20, and $221 per share, the purchase price on July 25.

8. *That according to the usual course of dealing, on trades for the*

account, it is probable that between July 25 and August 3, there had been substituted for the original purchasers on July 25, at $229 per share, other purchasers from day to day at other prices, the substitutions being made by the manager of the clearing house at his discretion, the parties substituted being notified of the substitution and assenting thereto in writing, and the differences in price being equated by paying into or taking from, the trust fund of $14,000 on deposit.

9. *So that when the contract of July 25 at $229 per share, through these daily novations and substitutions, had merged into the contract of August 3 at $222 per share, all prior contracts had been canceled and annulled; that Jamieson & Company, representing, as it now appears, J. H. & W. H. Moore, had then agreed to purchase the 700 shares of stock sold by Henry Clews & Company, through their brokers, Schwartz, Dupee & Company, and receive and pay for them, on the 31st day of August, $222 per share.*

Testimony of Collins, Tr. pp. 4.

10. *That after August 3, there was no further novation or substitution through the clearing house of the stock exchange, because, by resolution of its board of managers, the exchange, on August 4, closed its doors indefinitely, not opening, as a matter of fact, until November 5 following.*

BRIEF OF ARGUMENT.

I.

A: SCHWARTZ, DUPEE & COMPANY WERE FULLY AUTHORIZED BY CLEWS & COMPANY TO ENTER INTO THE CONTRACT OF AUGUST 3, IN THEIR BEHALF, AND CLEWS & COMPANY WERE BOUND THEREBY; B: BUT EVEN IF UNAUTHORIZED TO ENTER INTO THE CONTRACT OF AUGUST 3, SCHWARTZ, DUPEE & COMPANY IN MAKING IT AFFECTED TO ACT AS AGENTS OF CLEWS & COMPANY; AND THE LATTER RATIFIED THE CONTRACT AND ADOPTED IT AS THEIR OWN; C: AND EVEN IF IT SHOULD BE HELD THAT THE CONTRACT OF JULY 25, AT $229 PER SHARE, HAD BEEN LOST OR DISSIPATED AND IN LIEU THEREOF, SCHWARTZ, DUPEE & COMPANY HAD ATTEMPTED TO SUBSTITUTE THE CONTRACT OF AUGUST 3, AT $222 PER SHARE, CLEWS & COMPANY ARE ENTITLED IN EQUITY TO AVAIL THEMSELVES OF SUCH CONTRACT; D: FURTHERMORE, AND IN ANY EVENT, ALL PARTIES IN INTEREST BEING BEFORE THE COURT, THERE SHOULD HAVE BEEN MADE AN END TO THE LITIGATION BY ORDERING, IF NEED BE, THE FILING OF A CROSS-BILL.

(A) *Horton* v. *Morgan*, 75 Am. D. 326, note.
Maxted v. *Paine*, L. R. 6 Ex. 132.
Hodgkinson v. *Kelly*, L. R. 6 Eq. 496.
Sheppard v. *Murphy*, 16 W. R. 948.
Hawkins v. *Maltby*, L. R. 4 Eq. 572; affirmed on appeal, L. R. 3 Ch. App. 188.
Higgins v. *McCrea*, 116 U. S. 671.
Irwin v. *Williar*, 110 U. S. 511.
Bibb v. *Allen*, 149 U. S. 481.
Dos Passos on Stock Brokers and Stock Exchanges, Chap. 5, Sub-head VII.

(B) *Hagedorn* v. *Oliverson*, 2 M. & S. 485.
Cook v. *Tullis*, 18 Wall. 338.
Shoninger et al. v. *Peabody*, 17 A. R. 279.
Wharton on Contracts, Sec. 2.
Wharton on Agency, Sec. 81.
19 Cent. Law Journal, 482.
Dodge v. *Hopkins*, 14 Wis. 630.
Bank v. *Insurance Co.*, 104 U. S. 54.

(C) *Cook* v. *Tullis*, *supra*.

(D) *Sims* v. *Burk*, 109 Ind. 214.
Chamley v. *Lord Dunsany*, 2 Schoales & Lefroy, 690.

II.

A. THE CONTRACTS OF SALE AS ORIGINALLY ENTERED INTO BY SCHWARTZ, DUPEE & COMPANY ON BEHALF OF CLEWS & COMPANY JULY 16 AND JULY 20 WERE IN ALL RESPECTS CONVENTIONAL, AND BOUND CLEWS & COMPANY TO DELIVER A SPECIFIED NUMBER OF SHARES AT A SPECIFIED TIME AT A SPECIFIED PRICE, AND WERE THEREFORE PRIMA FACIE VALID. B. SUCH CONTRACTS WOULD NOT BE INVALIDATED EVEN IF THE TESTIMONY SHOWED THAT AT THE TIME OF ENTERING INTO THEM CLEWS & COMPANY DID NOT OWN OR CONTROL THE NUMBER OF SHARES OF THE PARTICULAR STOCK CONTRACTED FOR. C. SUCH CONTRACTS BEING PRIMA FACIE LAWFUL COULD NOT BE VOIDED AS WAGERING CONTRACTS BY SHOWING THAT ONE PARTY ONLY SO UNDERSTOOD AND MEANT THEM TO BE. TO VOID SUCH CONTRACTS AS WAGERING CONTRACTS, THE PROOF MUST GO FURTHER, AND SHOW A MUTUAL AGREEMENT AND UNDERSTANDING OF THE PARTIES, COLLATERAL TO THE CONTRACT OF SALE, THAT THE SUBJECT-MATTER OF THE CONTRACT SHOULD NOT BE DELIVERED OR RECEIVED, BUT THAT SETTLEMENT SHOULD BE MADE ACCORDING TO DIFFERENCES IN PRICE. D. AND SUCH COLLATERAL UNDERSTANDING MUST BE PLEADED AND FOUND AS A FACT FROM EVIDENCE DIRECTED TO THE PARTICULAR ISSUE, WITH THE BURDEN OF PROOF UPON THE PARTY SEEKING TO IMPEACH THE TRANSACTION, FAILING WHICH THE COURT IS WITHOUT WARRANT OR AUTHORITY TO IMPUTE UNLAWFUL MOTIVES OR INTENTIONS TO PARTIES LITIGANT; PARTICULARLY WHERE, AS IN THE CASE AT BAR, THERE IS NOT A SCINTILLA OF EVIDENCE INDICATING AN INTENTION TO GAMBLE ON THE PART OF ANY PERSON CONCERNED. E. THE SUBSEQUENT MUTATIONS OF THE CONTRACTS OF JULY 16 AND JULY 20, IN PURSUANCE OF THE USUAL AND CUSTOMARY METHODS OF THE CHICAGO STOCK EXCHANGE, DID NOT OPERATE TO CONVERT A CONTRACT OTHERWISE LAWFUL, INTO A GAMBLING CONTRACT; FOR AT NO SUBSEQUENT PHASE OF THE TRANSACTION WERE CLEWS & COMPANY RELEASED FROM THEIR ORIGINAL OBLIGATION TO DELIVER THE FULL NUMBER OF SHARES CONTRACTED FOR AT THE TIME SPECIFIED, AND BY NO POSSIBILITY COULD THEY RECEIVE FOR THOSE SHARES A GREATER OR LESSER AMOUNT THAN THE SUM ORIGINALLY AGREED TO BE PAID. F. A CONTRACT FOR THE DELIVERY OF A COMMODITY AT A PRICE CERTAIN AND AT A TIME SPECIFIED, IS NOT AN OPTION CONTRACT AND IS NOT, THEREFORE, WITHIN THE OPERATION OF THE STATUTES OF ILLINOIS PROHIBITING OPTION CONTRACTS.

25129

ARGUMENT.

I.

A.—Question of Privity.

If on the 16th or 20th of July, 1896, Henry Clews & Company had wired their brokers in Chicago to sell 700 shares of the stock of the Diamond Match Company at $222 per share, to be delivered July 31, and their brokers, Schwartz, Dupee & Company had truthfully reported that they had sold 700 shares of said stock at $222 per share to Jamieson & Company, to be delivered July 31, *and no change or modification of this contract thereafter occurred until the day of delivery*, at which time the shares contracted for had been tendered and refused, it would scarcely be pretended that an action would not lie by Clews & Company against Jamieson & Company for a breach of contract. The defense of want of privity, under such circumstances, would obviously be unavailing.

If on the 25th of July Henry Clews & Company had wired their brokers to obtain, if possible, an extension of time for delivery to the 31st of August following, and the brokers, having obtained the extension, so reported to their principals, this would have been a novation *sub modo* but would not have changed the mutual obligations of the parties.

A transaction such as the above represents the conventional contract of sale for future delivery *unmodified by any customs or usages peculiar to a stock exchange;* and yet so far as a client is concerned *no practical difference exists.* For in both cases the client simply instructs his broker to buy or sell a specified number of shares at a specified price to be delivered at a specified time; he secures his broker by a pledge of money, collateral, or credit in the one case as in the other; in neither case is he obliged to pay further attention to the transaction until the time arrives for delivery, at which time he delivers or receives the number of shares of stock contracted for, and pays or receives the price per share called for by the contract—no more and no less—or, failing to comply with his contract, is legally amenable for the breach.

It is apparent that so far as the client is concerned it is a matter of indifference whether his contract is executed on a street corner or on the stock exchange, provided, of course, his rights in the latter case be equal to his rights in the former case. He is aware that the stock exchange has methods of doing business peculiar to itself; he has been led to believe that by trading on the exchange rather than on the street, certain advantages will accrue. For instance: The trans-

action will be had with a member of the exchange who is probably acting for an undisclosed principal, but who nevertheless holds himself personally liable (Tr. p. 138, Art. IV; By-laws, p. 123); he is assured that no one can become a member of the exchange until he has been investigated by a committee as to his financial and business standing. To be a member of a stock exchange, therefore, is a valuable credential. He is further given to understand that a ready market is offered for all shares listed upon the exchange, thereby saving the delay and expense of advertising or seeking elsewhere; he is further given to understand that for breach of contract by one of its members it will not be necessary to seek redress in the courts and endure the law's delays or pay the expenses incident thereto, but that prompt redress will be given him, his damages measured by legal standards, and execution enforced out of a trust fund at all times on deposit, or by disciplining the member in default, if need be. (Tr. p. 138, Art. IV; By-laws, p. 137, Art. XV, 131, 133–4.) He is of course given to understand that the stock exchange is, and will be, at all times, a going concern for the attainment of these objects, Sundays and certain holidays excepted. (Tr. p. 138, Art. I, By-laws.)

Now the methods of doing business on the exchange among the members thereof is of no interest to the client if such methods produce the desired results; but if the doctrines announced in the opinions of the Circuit Court and the Circuit Court of Appeals herein are to obtain —if at its caprice a stock exchange can close its doors and cease indefinitely its usual functions, if a contract with one of its members by some hokus-pokus or manipulation is made to evaporate and disappear—if every one consenting to deal with its members according to the rules and usages prescribed by themselves, is to be, not merely in popular tradition, but according to judicial pronouncement, a gambler and a law-breaker—then these institutions should be compelled to adopt different methods or be raided by the police.

If we resist a distinct temptation at this point to enter upon a historical consideration of the stock exchange as an institution—its genesis and centuries of development, it is only because we do not feel called upon to vindicate its morals or its modes of operation. The fact that out of the teeming, ceaseless and illimitable business transacted on the stock exchanges of this country almost from its beginning, this is the first time, so far as judicial records show, that the methods and machinery of the stock exchange have been impeached, is proof conclusive that such methods and machinery have been thoughtfully devised for the protection of legal rights. That these methods and machinery have, in particular cases, been perverted and made to cover gambling transactions, notwithstand-

ing the penalties denounced against such dealing (Tr. p. 137–8, Arts. XVII and XXIX), goes without saying. But that the stock exchange itself, with all its machinery, is as necessary to modern commerce as railways, steamships, telegraphs, money or any other mechanism of exchange, is the deliberate judgment of every writer on political economy; and we respectfully submit that it should be the policy of the courts to bring these institutions and the methods, customs and usages peculiar to them, within judicial ken.

Now while in the case at bar the actual connection of Henry Clews & Company with the Chicago Stock Exchange was most casual, and their interest in *the clicking of its machinery* even more casual, it is true that they had agreed to sell according to the rules, customs and usages of the exchange, and must be bound thereby; but be it understood that the respondents, Jamieson & Company, members of the exchange, must be equally bound. These rules and usages become part of the contract, and this being so, what follows?

In *Bibb* v. *Allen*, 149 U. S. 481, it was said:

"It is settled by the weight of authority that where a principal sends an order to a broker engaged in an established market or trade, for a deal in that trade, he confers authority upon the broker to deal according to any well established usage in such market or trade, especially when such usage is known to the principal and is fair in itself, and does not change in any essential particular the contract between the principal and agent, or involves no departure from the instructions of the principal; provided the transaction for which the broker is employed is legal in its character, and does not violate any rule of law, good morals, or public policy."

In a note to *Horton* v. *Morgan*, 75 Am. Dec. 326, it was said:

"When the client employs a broker of the stock exchange to transact business he *necessarily* gives him the means to carry it through. The broker can, of course, only do this by making the transaction *in accordance with the course of business prevailing in the exchange* and founded upon the rules and usages of the exchange. It results as a natural consequence that the client can not avail himself of his supposed ignorance of the way in which business is conducted by brokers."

Says Mr. Dos Passos, in his work on Stock Brokers and Stock Exchanges, Ch. 5, Sub-head 7, p. 315:

"The last step in the transaction (*i. e.*, a sale for the account) is the actual delivery of the stock or securities by the original seller to the ultimate purchaser. This portion of the business most powerfully illustrates the influence and scope of the usages of the stock exchange upon the contract. * * *

The usages of the stock exchange produce the legal paradox of a vendor selling to a vendee with whom he does not have any

dealings, either personally or through his immediate brokers, and who frequently is not in existence in his character of purchaser when the vendor makes the sale. * * * A stock exchange transaction frequently exhibits a sale made *in præsenti* which takes effect *in futuro*, the place of the first vendee being frequently filled by another person or persons, who may purchase at a price different from that at which the first vendor originally sold.

All these seeming incongruities result from the usages of the stock exchange and the peculiar course of dealing carried on there. But it will be observed that the rights of a vendor are not in any way infringed or diminished by these ramifications of business."

The learned author further says:

"We have seen that a sale may be made either for money or for the account. * * * *If for the account, a vendor who launches a sale upon the exchange knows, or is presumed to know, that his vendee is not necessarily the person to whom his broker originally makes the sale, but may be a different person purchasing for some intermediate jobber at a subsequent date, and to whom delivery is to be ultimately made.*"

In England several cases have arisen which, it seems to us, throw light on the subject. A most thoroughly considered case is that of *Maxted* v. *Paine*, 6 L. R. E. 132, decided in 1871. The methods therein analyzed are but a step removed from the clearing house methods adopted by the London Exchange five years later, and more recently by the Chicago Exchange.

The opinion of Judge Blackburn in this case ought to have especial weight, for the learned jurist, as is well known, devoted much attention to the law of sales. The statement of the case of *Maxted* v. *Paine* taken from the syllabus is as follows:

"The plaintiff having through his brokers on the stock exchange sold to the defendant, a jobber, ten shares in Overend, Gurney & Co., Limited, the defendant on the "name day" passed a ticket to the plaintiff's brokers containing the name of G. as the ultimate buyer. No objection was made to the name, and the plaintiff executed a transfer to G. of ten shares. It was afterward discovered that the brokers named on the ticket as G.'s brokers had been instructed to buy by S., and had, in fact, bought a large number of shares for S. as undisclosed principal. The ten shares in question (the dealings not being for specific shares) were delivered to them as part of the shares so purchased; but the name of G. was passed in pursuance of S.'s instructions, and according to an arrangement by which G., who was a person of no means, consented to allow his name to be passed in consideration of a sum of money paid to him. The purchasing brokers as well as the defendant, were ignorant of this arrangement. Calls having been made on the shares which the plaintiff was compelled to pay, and which he was unable to recover from G., he brought this action to recover them from the defendant."

The principal defense was a novation by which defendant was released. Opinions were delivered by BLACKBURN, SMITH, LUSH, JJ., and COCKBURN, C. J. The opinion of Blackburn covers pages 147 to 181 of the report, from which we have extracted the following:

"All contracts on the stock exchange are made by the members among themselves as principals, and though from the fact that one of the parties is a broker, the other would have good reason to believe that there was an undisclosed principal behind, he would not know that for certain, and the contract would have the effect of making the two members liable to each other as principals. *The undisclosed principals of those two members can at law enforce, and are at law liable for the contracts made by their agents.* * * *

It appears by necessary inference, though not expressly stated, that there was a satisfactory settlement in account between all the various members of the stock exchange through whose hands the ticket had passed *as to the different and probably very different, prices at which they had bought and sold.* On the 13th of April, 1867, more than ten months after the defendant had every reason to believe the transaction was satisfactorily ended, (*i. e.*, that there had been a novation and he was discharged as the original purchaser) the plaintiff, for the first time, brought forward facts then recently discovered by him * * * by which it appears, in brief, that Foster & Co.'s client, Sir Samuel Spry, being desirous of evading the liability which he had instructed Foster & Co. to incur on his behalf, had sought out Goss, a person who, as JAMES, V. C., in *Castellan* v. *Hobson*, expresses it, on account of his vacuity might sing in the presence of a vice chancellor, and paid him forty-one pounds ten shillings to allow his name to be sent in as the transferee. Of course Goss has not paid the subsequent calls; the plaintiff has been forced to do so, and the right of action against Goss having been from the first worthless, he sought for redress. * * *

I think no one can read the above statement without feeling that the plaintiff is entitled to relief from somebody. He has selected the defendant Paine as the person whom he sues. And what we have to determine is whether the defendant is liable. The majority of the court below have held that he is not, and I have come to the same conclusion as the majority of the court, viz., that the judgment should be affirmed; but for reasons of my own, which I think it right to state fully, though the consequence is inconvenient length."

After citing cases intimating that the practice of the stock exchange is no more than machinery by means of which the person buying procures a nominee, the learned judge continues:

"The court of appeal, in each of these cases, determined that the practices and usages of the stock exchange were more than

such machinery, *and made it part of the contract when the sale was for the account, that there should be a novation.*"

The learned judge then goes on to consider what would have been the effect if the sale had been for cash on the exchange, instead of for the account, and adds, p. 159:

"Having said thus much I am now brought to what is the great question in the cause. What difference does it make that the contract was on the stock exchange for the account? I have no doubt that the plaintiff, now seeking to enforce a contract made on his behalf, must take the contract as it really was, *incorporating in it all the usages relative to such contracts.* And the questions, what are those usages, and what is their extent, and what do they mean, are all questions of fact to be ascertained by evidence. But when once they are ascertained the legal effect of the customs upon the contract is a question of law."

Considering this evidence and the rules of the exchange he says, p. 160:

"And I may state at once that, in my opinion, the whole difficulty in these cases as to bargains for the account arises from this, that those who have framed the rules, and those who by putting them in use have established a practice and understanding which ought to regulate the rights of the parties, *have mainly had in contemplation the establishment of a clearing house, for which they have provided with admirable skill,* and they have also provided for other matters *of every day occurrence,* such as the *payment of the price,* and the enforcing of the actual delivery of the transfers, though not perhaps quite so skillfully." * * *

"I will now proceed to state what I understand to be the effect of the rules and usages of the stock exchange. THE GREAT AND MAIN OBJECT OF THE MEMBERS OF THE STOCK EXCHANGE IN ESTABLISHING A PERIODICAL ACCOUNT AND MAKING THEIR RULES AS TO NAME DAYS AND SETTLING DAYS AND TICKETS SEEMS TO ME TO HAVE BEEN THE SAME AS THAT WHICH HAS LED TO THE ESTABLISHMENT OF THE CLEARING HOUSE, AND WHICH I TAKE TO BE THIS, THAT THE NUMBER OF ACTUAL TRANSFERS AND PAYMENTS SHOULD BE REDUCED TO A MINIMUM, AND THAT ALL THAT CAN BE DONE BY SETTING OFF ONE CONTRACT AGAINST ANOTHER, AND SETTLING THEM IN ACCOUNT WITHOUT ANY ACTUAL TRANSFER OR PAYMENT OF CASH, SHOULD BE DONE; AND NOTWITHSTANDING WHAT I CAN NOT HELP THINKING THE MISTAKEN OBJECTIONS OF THE LAWYERS OF THE PAST GENERATION AGAINST SETTLING MATTERS IN ACCOUNT, I THINK THIS IS A LAUDABLE AND CONVENIENT OBJECT.

* * * A member of the stock exchange may also be a broker, who has principals, though their names are never disclosed, and the member of the stock exchange makes the contract as prin-

cipal, and is personally liable as such. If a broker has made only one contract for one constituent to sell, and has made only one contract for another to buy, he will require from the person with whom he has the one contract to sell that he should actually relieve his selling constituent of the shares sold, and he will require from the person with whom he has a contract to buy that he shall actually supply his buying constituent with the shares bought, so that in that simple case there is no room for economy in the number of shares actually transferred. But if, as is very commonly the case, the broker has a speculative constituent who enters into many contracts, some to buy and some to sell, in the hope that he may get a profit from the fluctuation of the market, or if he, the broker, has carried over some of these transactions to the next account, it is obvious that the broker will, on the behalf of that constituent, only wish for the transfer of the balance of such shares.

The interest, therefore, which a broker member of the stock exchange has in establishing the principle of the clearing house is the same in kind, though not so extensive in degree, as that which a jobber member has.

In order, therefore, to effectuate the clearing house object the system of "tickets" has been introduced. The 87th rule requires that the "buyer" of shares, etc., shall pass a ticket for the same containing the names and address of the buyer in full, before twelve o'clock on the name day, either in the stock exchange or at the office of the seller. * * *

The member into whose hands that ticket is passed may either hold it himself or pass it on in furtherance of a contract made with another member. * * *

It is obvious that in carrying out this arrangement it may happen that a member becomes possessed of a ticket for A and B and C shares, when he is under contract to buy from one member A shares, from another B shares, and wishes himself actually to deliver C shares, and consequently wishes to pass to his two sellers two separate tickets for A shares and B shares, respectively, and himself to continue holder of a ticker for C shares. To meet this case a power of dividing or splitting the ticket is given, which is mentioned in the 87th and 91st rules."

Speaking of the exchange of tickets, he says:

"*There may be a great many intervening members between the two. The ticket which the member A holds at the end of the name day, bearing on it the name of the member Z as the original issuer, and which contains the name and address of either a member or a non-member as the person into whose name Z intends the shares to be transferred, may have passed through the hands of as many members as might be designated by all the intervening letters of the alphabet, and may have been split a dozen times;*

and the issuing member may have been a jobber or a broker, and the intervening members may have been brokers or jobbers, or both, and the holding member may be either a broker or a jobber. Still the result will be that the holder of that ticket is brought in contact with the issuer of it, and both must necessarily be members of the stock exchange. * * *

Sandeman & Company, as holders of the ticket, were brought into communication with Foster & Co., as issuers of that ticket, and they mutually dealt with each other as such. I incline to think that in such case the law would imply (or, if not, a jury might, and I would without hesitation find as a fact) that there was a contract between the holder and the issuer of the ticket to perform the reciprocal duties which they owe to each other as such.

This contract, in the language of a pleader before the Common Law Procedure Act, would have been thus expressed: 'In consideration that the holders of the ticket (that is, in this case, Sandeman & Co.), at the request of the issuers (that is, Foster & Co.), promised to treat them as the issuers and perform to them all things which the holder ought to perform to the issuer, they (Foster & Co.) then promised Sandeman & Co. to perform to them all things which the issuer ought to perform to the holder.'

If the parties entering into this contract were agents (as Sandeman & Co. were for Maxted, and Foster & Co. were for Spry) I apprehend their principals, though undisclosed and unknown, would be parties to the contract, and would be subject to the same liability as their agents and entitled to have the same benefit of the contract.

The contract would be implied very much on the same principle as that on which the assignee of a bill of lading receiving the goods is held to contract with the shipowner to pay him the freight originally due from the assignor of that bill of lading.

AND THE CONVENIENCE OF IT IN THE PRESENT CASE MAY BE MADE CLEAR BY SUPPOSING A TO HOLD A TICKET ISSUED BY Z, WHICH HAD PASSED THROUGH THE HANDS OF MEMBERS WHOM WE MAY DESIGNATE BY THE OTHER LETTERS OF THE ALPHABET, AND THAT Z, WITHOUT ANY VALID REASON, REFUSED TO PAY. IF THERE IS NO PRIVITY BETWEEN A AND Z, IT WILL BE NECESSARY IN ORDER TO ENFORCE THE PERFORMANCE OF Z'S DUTY FOR A TO SUE B, B TO SUE C, AND SO ON, TILL ULTIMATELY Y WILL SUE Z, WHO WILL THUS, AT THE EXPENSE OF TWENTY-FIVE LAW SUITS, BE COMPELLED TO PERFORM HIS DUTY BY A PROCESS VERY TROUBLESOME AND COSTLY, WHILST IF THERE IS PRIVITY BETWEEN A AND Z IT MAY BE ENFORCED BY A DIRECT SUIT BETWEEN THOSE PARTIES; AND THIS IMPOSES NO HARDSHIP UPON THE ISSUER OF THE TICKET AS IT ONLY PLACES HIM IN THE SAME POSITION RELATIVELY TO THE HOLDER OF IT IN WHICH HE WOULD HAVE STOOD TOWARD HIS FIRST VENDOR, IF THAT VENDOR HAD NEVER PASSED AWAY THE TICKET BUT HIMSELF DELIVERED THE SHARES DIRECT. * * *

Coles v. *Bristowe* and *Grissell* v. *Bristowe*, seem to me to determine that when the transfers have been delivered to the issuing member and the price is fully paid, there is a novation which frees the member who merely passed the ticket from further liability. And *Coles* v. *Bristowe* further determines that this novation does not arise from the voluntary act of the seller in accepting the substituted liability of a third party in accord and satisfaction of his contract. Coles had in that case taken alarm, and given his broker instructions to complete the transaction with Bristowe direct, and not to recognize any sub-purchasers except as nominees of Bristowe. The evidence as to this will be found at p. 151 of *Coles* v. *Bristowe* in Law Rep. 6 Eq. At p. 14 of the report of the case on appeal, in Law Rep. 4 Ch., Lord Cairns deals with this as an ineffectual attempt to vary a contract already made.

The case therefore decides that it is part of the contract for a sale for the account, that where the price has been paid and the transfers executed to the nominees of the member who issues the ticket, and the transfers have been delivered to the member who issues the ticket, the member passing the ticket is free from further responsibility. * * *

We, sitting in a court of co-ordinate jurisdiction, must hold that there is a 'novatio,' and it only remains open to consider what that 'novatio' is, and subject to what conditions.

It will be seen from what I have written that, in my opinion, the effect of the usage is that the member issuing the ticket is much in the position of one who has issued to his immediate contractor a promissory note, promising to perform to the assign of that promissory note those duties which he would otherwise have had to perform to that immediate contractor.

If there were no custom, the person contracting to take shares would promise to accept from his vendor a transfer, and to indemnify against future calls. The contract on the stock exchange for the account is to supply him on the name day with a ticket which he may either hold or pass on. Each member through whose hands the ticket passes is in a position analogous to the indorsee of that note, and the ultimate assignee who is actually to deliver the shares, is in a position analogous to the holder of that note, and I think that the effect of the custom is that, unless what resembles notice of the dishonor of this note is given within fifteen days (according to the rules), the intermediate indorsers of the ticket are released, and then, and not till then, there is a novatio, in my opinion, between the two members of the stock exchange who are in the position of holder of that ticket and issuer of it. THE STOCK EXCHANGE COULD ONLY REGULATE THE PROCEEDINGS FOR THEIR MEMBERS, BUT IF EITHER OR BOTH OF THOSE MEMBERS WERE AGENTS FOR

OTHERS, THE LAW SAYS THAT THE PRINCIPALS, THOUGH UNDISCLOSED, MAY SUE AND ARE LIABLE TO BE SUED TO THE SAME EXTENT AS THEIR AGENTS, AND NO MORE. AND THERE IS NO HARDSHIP ON EITHER PARTY IN A PRACTICE THUS UNDERSTOOD.

THE ISSUING MEMBER AND HIS PRINCIPAL HAVE NO ADDITIONAL BURTHEN OR OBLIGATION THROWN ON THEM; THE ONLY DIFFERENCE IS THAT THEY ARE LIABLE FOR THE FULFILLMENT OF THE SAME DUTIES TO ANOTHER PERSON. THE PRINCIPAL WHO INSTRUCTED HIS BROKER TO SELL, AUTHORIZED HIM TO CONTRACT WITH ANY MEMBER OF THE STOCK EXCHANGE, AND AFTER THE FIFTEEN DAYS HAVE ELAPSED, HE HAS THE SAME RIGHTS AGAINST THE ISSUER OF THE TICKET, WHO MUST NECESSARILY BE A MEMBER, THAT HE WOULD HAVE HAD AGAINST HIM IF THE CONTRACT HAD BEEN IN THE FIRST INSTANCE MADE WITH THAT MEMBER. AND THE CONVENIENCE AND SECURITY GIVEN TO THOSE WHO PASS THE TICKETS, BY A CUSTOM WHICH SECURES THAT THE FULL EXTENT OF THEIR LIABILITY ON EACH ACCOUNT SHALL BE FINALLY ASCERTAINED WITHIN FIFTEEN DAYS, IS OBVIOUS AND GREAT."

And the learned judge concludes his elaborate opinion in the following words:

"THE WHOLE MACHINERY OF THE STOCK EXCHANGE IS BASED ON THIS, THAT THE MEMBERS DEAL WITH EACH OTHER, AND ARE LIABLE TO EACH OTHER AS PRINCIPALS.

IT SEEMS TO ME THAT THE ULTIMATE NOVATION BY THE CUSTOM MUST BE BETWEEN THE MEMBERS, AND THAT WHEN IT TAKES PLACE IT PUTS THE MEMBER ISSUING THE TICKET UNDER AN OBLIGATION TO FULFILL EXACTLY THAT DUTY WHICH BEFORE THAT NOVATION HE WOULD HAVE HAD TO FULFILL TO THE MEMBER WITH WHOM HE HAD ORIGINALLY CONTRACTED."

The case from which we have thus ventured to quote so extensively decides five points:

1. That a contract for the sale of stock for the account is a contract in which the rules and customs of the stock exchange have been incorporated.

2. That the undertaking of the broker under such a contract is to furnish an ultimate purchaser and not any particular purchaser, or an ultimate buyer and not any particular buyer, as the case may be.

3. That between the date of the original contract and the date of its maturity various persons at various prices may become liable thereunder through a process of novation.

4. That the mere offer of a name, under the rules of the London Stock Exchange, does not work a substitution or a novation unless accepted, but that the lapse of fifteen days without objection conclusively presumes acceptance, releasing the party theretofore liable.

5. That the brokers nominally dealing between themselves are, nevertheless, liable to the undisclosed principals of each, and the undisclosed principals to each other.

In *Hodgkinson* v. *Kelly*, L. R. 6 Eq. 496, which is regarded as the leading authority in England on the subject, A bought of a jobber on the stock exchange shares in a certain company; and afterward (the company in the meantime having stopped payment) B sold to another jobber shares in the same company at a lower price for the same settling day. On the name day A's name was given to B as the purchaser of B's shares. B executed a transfer of the shares to A and delivered the transfer and certificate to A's broker, who paid the price for which A purchased the shares; A afterward repaid his own broker and took away the transfer and certificates, but did not execute the transfer, and it was never registered, in consequence of which B was compelled to pay certain "calls." B brought action against A to indemnify him against all consequences flowing from the ownership of the shares subsequent to the execution of the transfer.

The court, per ROMILLY, M. R., sustained the action, and a decree was entered for the plaintiff, the opinion of the court in part reading:

"It is not, as has been supposed, that the seller of shares constitutes an agent to find out and enter into a contract with some particular buyer, or, on the other hand, that the buyer does the same as to the seller, *but both parties agree to be bound by the usage of the stock exchange, which binds both parties from the beginning, but which leaves each of the parties to the eventual contract ignorant of the other until the day arrives and the instrument of transfer is executed.* It was put in argument as resembling a contract by which A sells to B, B to C, C to D and D to E; and at the request of B, C and D, A executes the transfer to E; but, in truth, this does not appear to me to put the case sufficiently high. IT IS, IN MY OPINION, AN ENGAGEMENT ENTERED INTO BY A ON ONE SIDE, AND E ON THE OTHER, THAT THROUGH THE INSTRUMENTALITY OF CERTAIN OTHER PERSONS, WHOEVER THEY MAY BE, CERTAIN SHARES SHALL BE SOLD AND BOUGHT, AND THEY UNDERTAKE TO COMPLETE THE CONTRACT WITH THE PERSON, WHOEVER HE MAY BE, WHO BUYS ON ONE HAND AND SELLS ON THE OTHER."

The court held that these usages were founded on common sense and common honesty, and that it was of no importance to A to know to whom his shares are to be transferred, nor is it to B to know from whence the shares come.

The machinery of the clearing house while seemingly complicated is, like nearly all machinery, very simple in its principles when once understood. IT MEANS A CONVENTIONAL CONTRACT OF

SALE FOR FUTURE DELIVERY NOVATED EVERY DAY UNTIL THE DAY OF DELIVERY. Here is all the mystery there is to it.

There can be no doubt that a party contracting in his own name and on his own account has the legal right to novate a contract every hour of the day and every day in the week, substituting a new contract for the one canceled; *and it seems to us equally clear that what a person can thus do for himself, he can authorize another to do for him and be equally bound by the acts so authorized.*

Let us assume that on July 25, 1896, Schwartz, Dupee and Company had received from Clews & Company a telegraphic message reading substantially as follows:

"Sell to whomsoever you think responsible 700 shares of Diamond Match Stock at $229 per share, to be delivered August 31st. If the person to whom you sell for any reason desires to subsequently cancel the contract and you can find some one to take it off his hands at a lower price, you are authorized to cancel the original contract and accept a substituted purchaser in the stead of the first purchaser, provided you are paid the difference in money. The money, of course, you will hold to our use. If the second purchaser in turn should wish to withdraw, and you or he can find some one willing to take the shares at a still lower price, you are authorized to cancel the existing contract, as before, and in like manner accept the third purchaser, provided you are paid the difference in cash. And this you may do on like terms whenever and as often as you may see fit. On the other hand if you deem it expedient to cancel the existing contract with whomsoever it may be, and obtain a contract at an advanced price, you are authorized to make such a novation and to pay and charge to our account whatever it costs to obtain such a contract and this you are also authorized to do whenever and as often as you may deem expedient."

Now, however unusual such instructions may sound in the ears of the lawyer accustomed only to the conventional relationship of principal and agent, it can not be said that there is anything vague or indefinite or dubious about the language employed. The meaning is plain. Neither is there anything wicked, unlawful or *dolus malus* about these instructions. The only question is, can the instructions be carried out so that at all times there will exist between the principal and the person with whom the agent contracts the relationship of vendor and vendee with a privity of contract?

Assume that the agent attempts to carry out these instructions. On July 25, 1896, he sells as instructed, but in his own name, without disclosing his principal, 700 shares of Diamond Match stock to A at $229 per share, to be delivered August 31st. That the undisclosed principal would have a right of action against A for breach of this contract will not be disputed. On July 26th,

however, A comes to the agent (the ostensible principal) and asks to recede from his contract, stating that B will take it off his hands at $228 per share, and that he (A) will pay the difference in cash. The agent looks at his written instructions to see if he is authorized to make such a novation. He finds the authority plainly given, in so many words, and so he consents to the arrangement, cancels the contract with A, receives the difference in price, to wit $1 per share, which he holds to the use of his principal, and enters into a new contract with B for $228 per share. *Can it be doubted that thenceforth there is the same privity between the undisclosed principal and B that had the day before existed between A and the undisclosed principal? The authority given to the agent was a continuing authority. It was as much a sanction of his particular act as though special instructions had been given him respecting the identical transaction.* If, therefore, on July 27th, B should come to the agent and request the privilege of withdrawing from his contract, offering as substitute C, who would take it off his hands at $227 per share, and should moreover offer to pay the difference in cash, the agent would have ample power to make the novation; for if he could make it once he could make it twice, and if he could make it twice he could make it every day in the month until the very day of delivery.

Assuming, then, that on August 3, C should come to the agent (the ostensible principal) and should ask consent to recede from his contract, offering Jamieson & Company as substitutes at $222 per share, agreeing to pay the difference in cash, would not the agent have authority to cancel the contract with C and enter into a new contract with Jamieson & Company at $222 per share, receiving the difference in price in cash, to the use of his principal, so that there should be thenceforth an absolute privity of contract between them (the principals) and Jamieson & Company?

The instructions actually given by Clews & Company to their agents, Schwartz, Dupee & Company, in the case at bar, were in all respects similar to those which we have assumed, and Schwartz, Dupee & Company did, under their instructions, only what they were authorized to do. To be sure, their instructions were not written out *in extenso*, but they were just as explicit, just as full, just as easy of comprehension, as though they had been.

In the English cases there have been several attempts to set forth the precise terms of the contract between a broker and his client on a trade for the account under the rules and usages of the stock exchange.

In *Sheppard* v. *Murphy*, 16 W. R. 948, which was an action in equity brought by the vendor against an ultimate purchaser, the court held, in answer to the argument that there was no privity be-

tween the plaintiff and the defendant, that the nature of a transaction on a stock exchange by which a vendor of securities was brought into contact with an ultimate purchaser, was not a contract between the possessor of a thing at the time and another party for the delivery of a specific thing, but a contract that the person who enters into it shall, upon the day on which it is to be performed, procure persons to do a thing that he undertakes shall be done, and that upon that occasion the person who is to receive this thing, and not until that day, shall pay these persons, and not the person who has made the bargain at all.

If we might venture to express the terms of the contracts between a broker and his principal, and between a broker and the fellow broker with whom he deals in a trade for the account, and in view of the rules, customs and usages of the Chicago Stock Exchange, we would say, that every stock broker, in effect, promises to give to his principal on the day of delivery the name of a purchaser, or the names of purchasers, as the case may be, a member or members of the exchange, contracting to receive and pay for the number of shares which the principal ordered sold at the price authorized, or at a different price; *provided*, however, that if the price to be paid by the purchaser or purchasers named is *less* than the price authorized, the broker will have on hand to the credit of his principal the difference in money; and *provided*, further, that if the price to be paid is *more* than the price authorized, the principal will have paid to the broker the difference in money. The principal on his part agrees, in effect, to accept the purchaser or purchasers so tendered, on the terms proposed and deliver to him or them the certificates of stock. Between themselves the brokers mutually agree that they will account to each other, or with those whom they may designate as principals, on the day of accounting.

B.—Ratification.

If we assume with the lower court that the only contract authorized by Clews & Company was the sale of 700 shares of Diamond Match stock, at $229 per share, and that therefore the sale of August 3d, at $222 per share, was not sanctioned by the appellants, it is evident that the appellants are here seeking to ratify and adopt the latter contract, which their agents, however unauthorized, assert to have been made on appellants' account.

But the trial judge, after holding that the appellants could not have been bound by the action of their agents (inasmuch as such action was unwarranted), further holds that the appellants could not even *ratify* the unauthorized act of their agents. His language is as follows:

"But if the defendants, under the substitution, could not hold the complainants as principals to the contract for the sale at $222, *then for want of mutuality the complainants are in no position to hold the defendants.* There is, indeed, no identity of contract between the one the complainants authorized and the one entered into between Schwartz, Dupee & Company and the defendants. *That the complainants now choose to accept it is of no significance;* the legal fact remains that they are not so bound, and not being so bound, the defendants, on their part, are not legally bound."

We respectfully submit that this logic would do away entirely with the doctrine of ratification. Ratification presupposes an unauthorized act on the part of an agent. It presupposes that the principal is not bound *ab initio*. Consequently it presupposes that there is a time, a *locus penitentiæ*, so to speak, when there is no privity or mutuality between the principal and the party with whom his agent affected to contract in his behalf. The contract in all such cases is, pending ratification, a contract between the agent and the other party. But we have read our text books to little purpose if the law does not give the option to the principal, under such circumstances, to either repudiate or ratify the contract. If he ratifies he adopts, as his own, the contract made by his agent and assumes it *cum onere*, that is to say, subject to all defenses which could be made in any suit by the agent himself. After ratification the principal, of course, is bound, and so is the party with whom his agent contracted. Thenceforth there *is* a privity. Indeed, *by fiction of law the ratification relates back to the very inception of the contract.*

The objection urged by the trial judge would apply equally to the contract of an infant who, apparently, is bound or not bound according to his caprice. And yet, as pointed out by Mr. Wharton (Contracts, Sec. 2), the want of mutuality must inhere in the contract itself in order to avoid it, and not depend upon the mere contingency that it may, or may not, be avoided.

Speaking on this subject he says (Idem):

"It is also said that exceptions to the rule requiring mutuality are to be found in cases where one of the parties can defend under the statutes of fraud, and in cases where an agent turns out to be acting for a principal subsequently disclosed. But in all these cases the question of liability is raised by confession and avoidance; and if we are told that there is no contract in such cases, we must hold that there is no contract in any case in which one of the parties could interpose a good defense, no matter what that defense may be. *In all these cases also the ratification* (or non-repudiation, as it is more properly called) *does not start a new contract; it merely confirms a contract already existing.*"

In commenting on the case of *Hagerdorn* v. *Oliverson*, 2 Maule &

S. 485, where an unauthorized person, acting as a *negotiorum gestor*, obtained an insurance on a ship for the benefit of the owner, and the ship was subsequently lost, and where it was held that the owner could afterward ratify the insurance, though he would not have been bound to have paid the premium, Mr. Wharton observes (Agency, Sec. 81):

"At the first glance this would appear to have been a case in which the owner was able to play fast and loose; to say, 'If the vessel is lost, I am insured; if she is not lost, I am not insured.' But this view is only superficial. Though *personally* the owner might have had this choice, *the contract itself was absolute.* The insurer, who insures a ship in consideration of a premium paid in, agrees to do something for a valuable and adequate consideration. *He insures for whomsoever it may concern.* His duties are fixed on the closing of the contract. * * * Whether the owner can sue upon the contract is a mere matter of form, for the agent can sue in case the principal can not. The insurer has lost nothing by the fact of the agent being unauthorized; he has been lulled into no false security; no intervening rights have been sacrificed by him. He insured the vessel on his own terms, and by those terms he is bound.'"

Justice FIELD, in *Cook* v. *Tullis*, 18 Wall. 338, observes:

"The general rule as to the ratification by one of the unauthorized act of another respecting the property of the former, is well settled. The ratification operates upon the act ratified *precisely as though authority to do the act had been previously given*, except where the rights of third parties have intervened between the act and ratification. * * *

"As is said in one of the cases cited by counsel, * * * 'the ratification is the first proceeding by which he (the principal ratifying) *becomes a party to the transaction;* he can not acquire or confer the rights resulting from that transaction unless in a position to enter upon a similar transaction himself.' Thus, if the individual pretending to be the agent of another should enter into a contract for the sale of land for his assumed principal, it would be impossible for the latter to ratify the contract if between its date and the attempted ratification he had himself disposed of the property."

A suit begun by the principal upon the contract of his agent has uniformly been held to be a ratification. The case of *Shoninger et al.* v. *Peabody*, 17 Atlantic Rep. 279 (a Connecticut case, decided in 1889), will serve as an illustration of the general doctrine. An agent of a piano firm, operating a branch store under a salary and a contract for commission, sold to the defendant a piano, with the agreement that the defendant should pay for it in commissions as a stock broker in various transactions between him and the defendant. To his principals, the plaintiffs, the agent reported the piano

as rented to the defendant. After the defalcation of the agent and the winding up of his business, the plaintiffs learned of the true nature of the transaction. They were evidently poorly advised, for instead of repudiating the transaction and seeking to recover the property in replevin, or its value in trover, they sued in assumpsit for the agreed price. Said the court, per LOOMIS, J.:

"The manifest wrong and injustice perpetrated upon the plaintiffs by the defendant and Day (the agent), make us regret that the principles of law applicable to the remedy chosen by the plaintiffs are not flexible enough to afford relief. * * * The whole trouble in this case arises from a mistake as to the plaintiffs' remedy. When the plaintiffs were informed of the terms of the contract made by their agent for the sale of the piano to the defendant, they had an election to repudiate the arrangement, and, by tendering back what they had received in ignorance of the terms of the sale, and demanding the piano, they could have recovered it by an action of replevin, or obtained its value in trover. But, knowing the terms of the sale, they elected to sue in assumpsit on the contract for the agreed price, and thereby they affirmed the contract and ratified the act of the agent, precisely as if it had been expressly approved upon being reported to them by the agent or the defendant; and in contemplation of law *a subsequent ratification and adoption of an act has relation back to the time of the act, and is tantamount to a prior command.*"

It is true the doctrine announced by his honor, Judge GROSSCUP, is supported by Mr. Mechem in his work on Agency, Sec. 179, where the learned author says:

"If an agent, without authority, enter into a contract with another, by which, on account of such lack of authority, the alleged principal is not bound, the principal can not, when he afterward finds that the contract is advantageous to him, affirm the contract so made and compel the other party to perform it on his part."

The reason which the author assigns for the rule announced, is the same as that given by Judge GROSSCUP, and is as follows:

"As a rule the obligations of a contract must be mutual; both parties must be bound or neither. Hence, if the contract made by the agent was not binding upon the principal because of the agent's want of authority, the contract lacks this element of mutuality and the principal not being bound the other party is free also."

The principal case cited by the author in support of his doctrine is *Dodge* v. *Hopkins*, 14 Wis. p. 630. This case has been criticised by Mr. Freeman in a learned note to *Atlee* v. *Bartholomew*, 5 Am. State Reports, p. 109, and defended by Mr. Mechem in an article in the 24th American Law Review, p. 580; criticised in an

article in the 25th Am. L. R., p. 74, and in an article in the 9th Harvard L. R., p. 64.

From the article in 25th A. L. R., p. 74, we quote as follows:

"The writer believes the correct doctrine to be that announced by Mr. Wharton.

"It is the only view which allows full force to the maxim, '*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*' On all hands it is admitted that the ratification of the principal relates to the time of the contract and is equivalent to a previous authority to the agent. From the ratification the principal becomes, for all purposes, bound by the contract from the time of its execution. If, then, the other party be not bound from such time, the ratification is not, as to such party, equivalent to a previous authority. The maxim in such case would be only half-way true. No such right accrues to the principal as would have accrued to him had there been a prior command, and no such liability devolves upon the other party as would have devolved upon him had there been a prior command. At the same time the same liability devolves upon the principal as would have devolved upon him had there been a prior command, and the same benefits accrue to the other party as would have accrued to him had there been a prior command. But this is not mutuality and mutuality is the essence of Mr. Mechem's rule. Thus, in a very important sense, such ratification is not equivalent to a previous authority. Had there been a previous authority both parties would have been bound from the time of the contract.

"But, Mr. Mechem objects, 'as a rule the obligations of a contract must be mutual; both parties must be bound or neither.' Yes, this is the rule, but there are numerous exceptions to it; or, more properly, this is a generalization inapplicable at times to many cases. Why may not the present case be one of them?

"Let us suppose for a moment that it is not. Then the argument of Mr. Mechem is suicidal. The sword has two edges and cuts both ways. He maintains that the principal is bound from the time of his ratification, but the other party is not bound until his own subsequent ratification. During the time that elapses between these ratifications the principal is bound while the other party is not. But where is the mutuality of this? He maintains that the principal can not by his ratification 'bind the other party also to the contract.' How, then, can the other party by his ratification bind the principal to the contract? Where is the mutuality of this? Ratification is an *agreement*, express or implied, to adopt an act performed by another for us.

"Certainly we may question the consistency of Chief Justice DIXON when, in *Dodge* v. *Hopkins*, he strongly declares for this doc-

trine of mutual obligation and yet, in seeking to avoid the force of the cases to the contrary, he uses this language: 'The inaccuracy consists in not properly distinguishing between those cases where the subsequent act of ratification is put forth as *the foundation of a right in favor* of the party who has ratified, and those where it is made the basis of a demand *against* him.' There is not much mutuality in this distinction.

"In Mr. Mechem's view of the case ratification is impossible. The principal before his ratification is not bound, because the act of the agent was unauthorized. The other party is not bound because the obligation of contracts must be mutual and the principal is not bound. The principal after his ratification and before the ratification of the other party is not bound, because his ratification can not bind the other party, and the other party remains unbound and the obligations of contracts must be mutual. To hold otherwise would be to hold that one party was bound when the other was not. Nor can he be bound from the ratification of the other party until his own second ratification, because 'it can not rest with one party alone to bind the other party also to the contract.' Nor can he be bound at the time of his second ratification, because up to that time he was not bound and the other party, in consequence, could not be, and his act could not bind the other party. And so on *ad infinitum*. * * * The conclusion must be that Wharton is right or that the contract is necessarily and forever a nullity. The latter will be admitted by no one. The former, then, must be true."

On principle, we should say that the doctrine of ratification ought not to be over-refined. In the case at bar, Schwartz, Dupee & Company could have assigned their contract with Jamieson & Company and the assignee could have sued thereon, taking the contract *cum onere*, that is to say, subject to all defenses which could have been made in a suit by the assignor; the practical effect of ratification is therefore the same as an assignment.

Jamieson & Company knew, of course, that Schwartz, Dupee & Company were brokers and in all probability acting for undisclosed principals. They contracted with them and with whomsoever they might represent.

C.—Appellants' Right to Their Agent's Remedies.

If it were true that on the 25th of July, 1896, Schwartz, Dupee & Company, as agents for the appellants, obtained for them a contract for the sale of 700 shares of Diamond Match stock at $229 per share, appellants furnishing seven thousand dollars cash to secure

the same, and, as we have seen, nearly six thousand dollars cash to obtain the same—if it were true that, without authority from the appellants, Schwartz, Dupee & Company bartered, and thereby canceled, this contract for the contract of August 3rd at $222 per share, which they made in their own name and in their own right, still using seven thousand dollars ($7,000) of appellants' money to secure the same, then Schwartz, Dupee & Company would have been guilty of a fraud in law whatever might have been their intention in fact. A contract—a chose in action—is *property*. If an agent converts the property of his principal into other property of a like or unlike kind, taking the title thereto in his own name and to his own use, it is a fraud upon the principal, and the law regards him as a trustee for the principal to the extent of the property so obtained.

The case of *Cook* v. *Tullis*, already cited, is an authority in point:

"Now, it is a rule of equity jurisprudence," says the opinion of Mr. Justice FIELD, page 341, "perfectly well settled and of universal application, that where property held upon any trust to keep or use or invest it in a particular way, is misapplied by the trustee and converted into different property, or is sold and the proceeds are thus invested, the property may be followed wherever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the original owner or *cestui que trusts*."

The doctrine is thus stated by Mr. Pomeroy in his work on Equity Jurisprudence, Vol. 2, Sec. 1051:

"If an *agent* or bailee wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name, in these and all similar cases equity impresses a constructive trust upon the new form or species of property, not only while it is in the hands of the original wrong-doer, but as long as it can be followed and identified in whosesoever hands it may come, except into those of a *bona fide* purchaser for value and without notice; and the court will enforce the constructive trust for the benefit of the beneficiary owner or original *cestui que trust* who has thus been defrauded."

D.—THE DUTY OF EQUITY TO END LITIGATION.

All parties in interest were before the court. The finding of the referee and of the trial judge is, that on the 3d day of August "there came into existence by the transactions stated a contract, whereby primarily between Schwartz, Dupee & Company and the

defendants (Jamieson & Company), the latter were obliged to purchase of the former and the former were obliged to sell to the latter during the month, 700 shares of this stock at the price of $222 per share."

"Nor can there be any doubt," says the opinion, "that the undisclosed principals of either of these parties were entitled to step into the places of these respective brokers, and in their own name and for their own benefit, insist upon the enforcement of the contract according to its terms."

Did Schwartz, Dupee & Company represent any principals in this transaction or was the contract made on their own behalf? They claim, both in the evidence and in their answer, to have acted on behalf of the appellants. They disclaim any interest in the contract whatever, or in the fourteen thousand dollars deposited to secure it. The testimony further discloses that while it is true Schwartz, Dupee & Company were accountable to appellants under the contract of July 25, 1896, for the sale of 700 shares of Diamond Match stock, at $229 per share, the appellants had received in cash the difference between said number of shares at $229 and $222, *so that Schwartz, Dupee & Company, in any event, would be liable only to them for the precise amount here involved.* Is it possible that under such circumstances, appellees can escape liability, because Schwartz, Dupee & Company, whom they confessedly owe, disclaim all interest in the contract, and on that account refuse to sue, or file a cross-bill?

Had they filed a cross-bill in this case against appellees they would have been entitled to recover; but it goes without saying that where all the parties in interest are before the court and an end to the matter can not be made for insufficiency of pleading, a court of equity may order a cross-bill to be filed, and in one case, at least, a decree was reversed because the court neglected of its own motion to order the filing of a cross-bill, in order that there might be an end to litigation.

See *Sims* v. *Burke*, 109 Ind. 214.

Chamley v. *Lord Dunsany et al.*, 2 Shoales & Lefroy's Rep. 689, was decided by the House of Lords in 1807, on an appeal by Chamley.

The facts in the case were rather complicated, as will appear from a reading of the various opinions; "a case more entangled," said Lord ERSKINE, "than any other I ever had to consider."

For an understanding of the particular point to which we cite the case, the facts may be summarized as follows:

Messrs. Latouche had taken possession of the property of one Warren under a grant *in custodiam* of his estates. The custodian

process, peculiar to Ireland at that time, is thus described by Lord REDESDALE (p. 694), and heartily condemned by him as iniquitously oppressive:

"In order to have a custodian the person who is the creditor proceeds to outlaw the debtor, and then the creditor obtains from the exchequer a grant of the debtor's estate, which is forfeited to the crown by means of the debtor's outlawry. The creditor having obtained the grant *in custodiam*, is put in possession of all the debtor's lands, and all the tenants to the estate are bound to pay their rents to him; and all prior creditors are excluded till such custodee is satisfied."

By a series of fraudulent dealings the appellant, Chamley, who was the attorney for the outlaw, Warren, obtained possession of a portion of the estate with the Messrs. Latouche. The Messrs. Latouche, with the fatuity of scoundrels, brought suit against subsequent mortgagees and judgment creditors of Warren, Lord Dunsany being the particular object of attack, and fraudulently obtained a master's report which would make their holding of Warren's estate practically perpetual. Lord Dunsany commenced a cross-suit. *In both these suits Warren was party defendant, but set up no claim on his own account nor did he ask affirmative relief.* From a decree pronouncing Chamley's claims to the land fraudulent, and his possession and receipt of the rents likewise fraudulent, and requiring him to account to Warren, the proceeds to go to Warren's creditors, Chamley appealed.

He urged six reasons why the decree should be reversed, the fourth and fifth (p. 691) reading as follows:

"4. That if any money was due from the appellant to Warren, the personal representative of Warren is the person to recover it, and not the respondents as creditors.

"5. For that so much of the decree as directed an account between the appellant and the co-defendants, Messrs. Latouche, was not warranted by the practice of the court, being a decree between co-defendants."

On these points Lord REDESDALE, in an opinion both luminous and voluminous, says, p. 708:

"A court of equity must pronounce its decree according to the case made and proved; and if such case and proof show that the property was held fraudulently, or in trust, or both, as in this very peculiar case, the court must so declare, and act upon it accordingly; and instead of such a declaration being objectionable, it appears to me to be the duty of a court to make it, in order to prevent a multiplicity of suits."

And further, p. 709:

"*But it seems strange to object to a decree because it is between co-*

defendants, when it is grounded on evidence between plaintiffs and defendants. It is a jurisdiction long settled, and acted on, and the constant practice of a court of equity; so much so that it is quite unnecessary to state any case in its support."

And Lord ELDON, acquiescing in these views, states, p. 718:

"It is said that a decree is made between defendants, and that such is contrary to the practice of a court of equity, because there can not be a cross-examination between co-defendants. I dwell on this objection because it has been made by the solicitor general, whose arguments are entitled to the very highest respect. Whatever he says must have considerable weight with this house, and with no member of it more than myself, who have had such opportunities of learning the extent of his talents. But, my lords, *where a case is made out between defendants by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity is entitled to make a decree between the defendants.* FURTHER, MY LORDS, A COURT OF EQUITY IS BOUND TO DO SO. *The defendant chargeable has a right to do so. The defendant chargeable has a right to insist that he shall not be liable to be made defendant in another suit for the same matter that may then be decided between him and his co-defendant. And the co-defendant may insist that he shall not be obliged to institute another suit, for a matter that may be then adjusted between the defendants.* AND IF A COURT OF EQUITY REFUSED SO TO DECREE, IT WOULD BE GOOD CAUSE OF APPEAL BY EITHER DEFENDANT."

II.

THE QUESTION OF GAMBLING.

Had the respondents in their answer to petitioners' bill of complaint interposed the defense of gambling; had testimony before the master been directed to the issue thus raised, and had the master found as a fact that under the guise of a contract, legal in form, the parties to it had, nevertheless, mutually agreed that the subject-matter of the contract should not be tendered or accepted, but that a settlement should be had according to differences in price; and had the master's finding in this behalf been sustained by the trial court, and affirmed by the Circuit Court of Appeals, the case at bar would present no features of novelty or of unusual interest.

But the respondents in their answer did not seek to impeach the transaction on the ground that it was wagering or gambling; no testimony was introduced before the master remotely touching such an issue; and it was only in response to the innuendoes of counsel in oral argument that the master found affirmatively that

the transaction was not gambling. This finding of the master was, in effect, affirmed by the trial court when his honor, Judge Grosscup, speaking of the contract here sued upon, declared:

"*There can be no question* that there came into existence by the transactions stated a contract, whereby, primarily between Schwartz, Dupee & Company and the defendants, the latter were *obliged* to purchase of the former, and the former were *obliged* to sell to the latter, during the month, seven hundred shares of this stock at the price of $222 per share."

Whether the transaction *on its face* disclosed an intention of the parties *necessarily* unlawful, and rendering the contract between them gambling *per se*—this question, perhaps, was still in the case, and the Court of Appeals, therefore, would, of its own motion, be justified in taking judicial notice of it.

We have seen that a sale for future delivery on the Chicago Stock Exchange must, under the rules of that institution, go through the clearing house. We have seen that the transaction out of which this controversy arose proceeded step by step through the usual and ordinary routine, resulting in the contract of August 3d, upon which this suit was brought. *There is not a circumstance in the transaction out of the ordinary, save only as the methods peculiar to the Chicago Stock Exchange have made it so.* Nevertheless, the Circuit Court of Appeals has declared the transaction to be a gambling transaction. The decision of the Court of Appeals is the most far-reaching on this important subject in the whole body of the law. *Its effect is to make every one, availing himself of the machinery of a stock exchange to effect sales for future delivery, a gambler in spite of himself and regardless of his intentions.*

That a stock exchange offers unusual facilities for *speculation* in shares of corporate stocks may be admitted. But the law does not prohibit speculation, however much individual judges may reprobate it. A man has as much right to exercise his judgment as to the future values of corporate stocks and trade in them accordingly, as the merchant has to order his winter stock of dry goods in the middle of July, or a contractor to agree with the Government to supply beef for the Indians, himself not owning a neat's foot. Sporadic legislation against contracts of sale for future delivery has, on trial, proved more harmful than healthful, and in every instance, so far as we are aware, has been repealed. On the whole, the proneness of human nature to *risk* has made for good rather than evil, and the poet was supposed to have uttered a noble sentiment when he said:

> He either fears his fate too much,
> Or his deserts are small,
> Who dares not put it to the touch,
> To win or lose it all.

In common parlance, the man who agrees to buy shares of ock as an investment, to put away in his strong box to await the evelopment of the enterprise represented by them, is a conserva- ve business man, particularly if, *in the long run*, his judgment is indicated; while the man who agrees to buy or sell hoping to real- e a small profit on the turn of the market—even before he is alled upon to perform, perhaps—is a gambler. The law makes o such invidious distinction. It does not predicate a principle on he mere lapse of time. Both are speculators, neither is a gambler. ndeed, there is more logic than casuistry in the argument which educes all enterprise to speculation and, as it were, to gambling; nd the common law, as we know, upheld wagers. But there is an thical as well as legal distinction between lawful and unlawful peculation—between business and gambling. In case of a wager s to whether a thing will or will not happen, the loser has nothing vhatever to show for his loss; whereas the man who has agreed to uy a thing at a future time at a price greater, as the event shows, han he could then purchase it, obtains the thing contracted for; nd the man who agrees to sell a thing at a future time for less than ie might then obtain in the market, receives the price he bargained or.

As said by AGNEW, J., in *Kirkpatrick* v. *Bonsall*, 72 Pa. St. 158:

"We must not confound gambling, whether it be in corpora- ion stocks or merchandise, with what is commonly termed speculation. Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly. In other words they think of and weigh, that is, speculate upon, the probabilities of the coming market, and act upon this lookout into the future, in their business transactions; and in this they often exhibit high mental grasp, and great knowledge of business, and of the affairs of the world. Their speculations display talent and forecast, but they act upon their conclusions and buy or sell in a *bona fide* way. Such speculation can not be denounced. * * * *The illegal pur- pose is therefore a fact falling within the province of the jury*, and when found by them, brings the contract under the ban of the law."

And the language of THOMPSON, C. J., in *Smith* v. *Bouvier*, 70 Pa. St. p. 332, is equally to the point:

"*Bona fide* time contracts about stocks and other personal prop- erty seem from custom to be necessary in our country, and although such transaction may be greatly affected by the rise and fall of the market, yet they are not for this reason obnoxious to the objec- tions made to the transactions we are now considering; for in such case the losing party has something for his money, but the losing gambler nothing.

"The doctrine contended for here would place all stock contracts

on the same footing, if making profits may be deduced as the motive of the parties buying and selling. When stocks are bought and sold, to be actually delivered, it is a very different case from that of Brua's appeal, *supra*, where the transaction was found to have been simply a bet or wager. In the one case the transaction is within the scope of a business everywhere recognized as legitimate; in the other it is a gambling transaction, which courts will never exert their power to enforce, if not entirely executed by the parties."

In *Porter* v. *Viets*, Fed. Cas., 11, 291 (Illinois, U. S. Circuit Ct.), Judge DRUMMOND possibly went too far in excluding evidence of a collateral understanding, but his definition of a wagering contract is clear and forcible.

V. sold corn to P. at forty-eight cents, for delivery June 30; when that time came, corn had risen to sixty-three cents; V. refused to deliver. Suit brought for non-delivery. V. set up that at time of making contract (April) he had not the corn to deliver, nor had he entered into any contract to purchase it to fulfill his contract with P.; nor had he any expectation of obtaining corn; that it was not intended by parties that corn should be delivered, but that it was a contract for the payment of the difference between price mentioned and its market value at time of delivery; that it was nothing more than a wager between parties as to price of corn at the time fixed on, and that the contract was only a cover to the real intent of the parties, which was merely a bet, and nothing more.

DRUMMOND, J.: "Whatever doubt may have formerly existed, it must be now considered that the settled law, both in England and in this country, that the mere fact that a man *may not have in his possession, and has not attempted to acquire possession of, a particular commodity, which he undertakes to sell, deliverable at a future time, will not render illegal a contract made by him to sell and deliver the article.* He is bound by his contract, nevertheless, and must deliver the property, or be subject to the consequences of a non-delivery. It is an agreement to sell and deliver at a future day, and to release a party from such a contract, because he did not at the time have the property, would interfere too much with commercial contracts. * * * If corn had fallen fifteen cents a bushel, Viets would have insisted on P. & Co. carrying out *their* contract! Both parties entered into it with full knowledge of the risk they ran, and the court will not help one of them because his judgment was unsound, or because something occurred that he did not foresee. * * * It is not necessary to decide in this case whether a wager between these parties as to the price of corn at a particular time was valid or not. The defendant now insists that he did not make such a contract as is presented to the court by the pleadings, but that it was an agreement to pay the

difference between the price of corn as stated, and the price at a future day; in other words, he wishes to prove what the law determines is ordinarily the measure of damages for the non-performance of his contract. The rule is well settled that when two men make a contract, and reduce it to writing, and sign it, that is the contract between them. It can not be shown verbally that something different was intended at the time from what appears in the writing. * * * Here no fraud is pretended; the contract is free from doubt or ambiguity. It is to deliver a certain quantity of corn at a certain time for a certain price, all set forth in writing. The defendant says that he wishes to show that the intention of the parties at the time was to make a wager as to the price of corn during the last half of June, and that the amount of the wager and the party who was to win or lose was to depend upon the market price of corn. *Now it may be true that the result is precisely the same—that is, the one party loses and the other party gains the same amount as in a wager. So it is in any case of this kind, when a party does not perform his contract.* But that circumstance does not make the CONTRACT the same. In the case of a wager on the *price*, when a man pays the '*difference*,' he performs his *contract*, but he does not fulfill *this* contract by paying the difference. HE MEETS THE PENALTY THE LAW IMPOSES FOR A BREACH OF IT. Here this defendant wishes to establish orally that another contract was made at the time, not in writing, and which he alleges was illegal, in order to make out the illegality of the written contract. This can not be done. No doubt all contracts which are illegal may be attacked, but no case has been shown which authorizes a party to prove verbally, that another contract (in itself illegal) existed, *and so get rid of a written contract on its face unexceptionable.*"

In *Hentz* v. *Jewell*, 20 Fed. Rep. 593, (Miss.) HILL, J., said: "If, according to the contract between the parties when made, EITHER MAY DEMAND A STRICT COMPLIANCE WHEN THE TIME FOR PERFORMANCE COMES. THEN THE CONTRACT IS VALID, EVEN THOUGH ONE OF THE PARTIES MAY SECRETLY INTEND AT THE TIME NOT TO COMPLY, IF SUCH NON-PERFORMANCE IS NOT AGREED TO BY THE OTHER CONTRACTING PARTY AT THE TIME OF CONTRACT. In other words, to render the contract invalid, there must *at the time of its creation*, be a mutual understanding between the parties that no delivery is to be made, but only the difference in prices paid."

The *syllabi* in *Clarke* v. *Foss et al.*, 5 Fed. Cas. No. 2852 (7 Biss. 540), give a categorical statement of the propositions we contend for.

The *syllabi* with their annotations read as follows:

1. A contract for the delivery at a future time of personal property, *which the seller has not on hand when the contract is made, nor any means of getting it*, is not void for illegality.

2. *The secret intention of one of the contracting parties not to fulfill his contract, uncommunicated to the other, is not enough to make the transaction illegal.*

(Approved in *Ward* v. *Vosburgh*, 31 Fed. 14.)

3. The intent that such a transaction should be a mere betting on the market, without any expectation of actual performance *must be mutual and constitute an integral part of the contract in order to render it invalid.*

(Approved in *Ward* v. *Vosburgh*, 31 Fed. 14.)

4. *If the contracts were valid in their inception* and not tainted with any gambling intent or device, *a subsequent mutual settlement by the parties by payment of differences*, instead of by actual delivery, *can not make them void for illegality.*

(Approved and applied in *Gilbert* v. *Gaugar*, Case No. 5412; *Ward* v. *Vosburgh*, 31 Fed. 15, 16; cited in *Third Nat. Bank* v. *Harrison*, 10 Fed. 250; *Jackson* v. *Foote*, 12 Fed. 41; *Hentz* v. *Jewell*, 20 Fed. 593.)

The case of *Clark* v. *Foss et al.*, arose out of contracts made in Illinois and the case was decided according to the law of that State.

One of the leading authorities in the United States is *Sawyer, Wallace & Co.* v. *Taggart*, 77 Ky., p. 727.

The *syllabi* in this case read as follows:

1. CONTRACTS FOR THE SALE OF GOODS TO BE DELIVERED AT A FUTURE DAY ARE NOT INVALIDATED BY THE CIRCUMSTANCE THAT, AT THE TIME OF MAKING THE CONTRACT, THE PURCHASER INTENDS TO RESELL BEFORE THE TIME APPOINTED FOR THE DELIVERY.

2. CONTRACTS FOR FUTURE DELIVERY, ENTERED INTO WITHOUT ANY MUTUAL AGREEMENT, TACIT OR EXPRESS, THAT THEY ARE NOT TO BE PERFORMED BY DELIVERY OF THE GOODS AND PAYMENT OF THE PRICE, ARE VALID, AND NO SUBSEQUENT AGREEMENT TO SETTLE THEM BY THE PAYMENT OF DIFFERENCES CAN RENDER THEM INVALID.

3. THE FACT THAT THE PURCHASER FOR FUTURE DELIVERY INTENDS NOT TO RECEIVE AND PAY FOR THE GOODS, BUT TO RESELL THEM BEFORE THE DATE OF THE DELIVERY, FURNISHES NO GROUND FOR HOLDING THAT IT WAS TACITLY UNDERSTOOD THE CONTRACT WAS NOT TO BE PERFORMED, AND WAS TO BE SETTLED BY THE PAYMENT OF DIFFERENCES.

4. A purchaser of goods for future delivery—through a commission merchant by depositing a margin—who orders a resale before the contract time for delivery, is liable for all losses thereby sustained.

5. A GAMING CONTRACT IS ONE IN WHICH IT IS AGREED OR UN-

DERSTOOD IN THE BEGINNING THAT THE THING DEALT FOR IS NOT INTENDED TO BE DELIVERED, BUT THAT THE PARTIES ARE TO SETTLE THEIR MUTUAL WAGERS ON THE PRICE, BY PAYING THE DIFFERENCE BETWEEN SALES AT DIFFERENT TIMES.

The contract under consideration in the case of *Sawyer, Wallace & Co.* v. *Taggart* was made on the New York Cotton Exchange.

Say the court:

"Sales for future delivery have long been regarded and held to be indispensable in modern commerce, and as long as they continue to be held valid, one who buys for future delivery has as much right to sell as any other person, and there can not, *in the very nature of things, be any valid reason why one who buys for future delivery may not resolve, before making the purchase, that he will resell before the day of delivery*, and especially when, by the rules of trade and the terms of his contract, the person to whom he sells will be bound to receive the goods from the original seller, and pay him the contract price. * * *

"But if A, desiring to engage in trade, enters into a contract with B for the purchase of an article for future delivery and becomes bound to receive and pay for it, that is a real transaction, and is valid whether made in the country or on 'Change. What difference, then, is made in the nature or character of the transaction if, instead of intending to receive the article himself and pay for it, he intends to resell it, and thereby procure another to receive and pay for it in his stead?

"*The material matter is that the contract shall be such that its performance can be enforced. If, in the case put, A does not, by reselling, procure another to perform the contract for him, he is bound to perform it himself.* * * *

"It is next contended that such understanding (to gamble) is shown by the fact that in the whole course of dealing between Sawyer, Wallace & Co., and Hamiltons, extending over a period of about two years, and amounting in the aggregate to several hundred thousand dollars, no goods were ever actually received by either on account of any of said transactions.

"This argument would have much force but for the fact that all these transactions were had with the same intention to resell and the further fact that sales were actually made in all instances, just as in those we are considering. If one such transaction might be legally had, then many made with the same object in view would be equally lawful. * * *

"BUT COUNSEL CONTEND THAT THE RULES OF THE NEW YORK EXCHANGE ARE SO FRAMED AND THE COURSE OF DEALING THERE IS SUCH THAT DELIVERIES CAN NOT BE ENFORCED, AND THAT THIS PROVES OR TENDS TO PROVE THAT THE PARTIES UNDERSTOOD THESE CONTRACTS

WERE NOT TO BE ENFORCED. RULES 4, 6 AND 8 OF THE COTTON EXCHANGE ARE INDICATED AS ESTABLISHING THIS VIEW.

"Rule 4 provides that either party to a contract may close or cancel it upon notice in writing to the opposite party at any time before notice of delivery. But how? The rule goes on to provide that 'the party to whom notice is given has the option either to make settlement (*i. e.*, to pay or receive the difference), or to receive a satisfactory contract made equal to that held by him.'

"Upon such notice being given, the party receiving it *is not compelled* to accept settlement by payment of differences. He has, by the express language of the rule, the 'option' to demand another contract equal to that held by him. The only effect of the rule is, that if the party giving the notice can procure a party satisfactory to him to whom notice has been given to take his place and perform the contract, the contract of such person must be accepted in lieu of the original contract. This is but a reasonable regulation which, while it does not deprive the party receiving the notice of the right to demand the thing purchased, or to deliver and receive payment for the thing sold, may be, and doubtless is, of great practical value and importance to trade, and in no way tends to facilitate fictitious trading or gambling on market prices.

"Practically the rule amounts to this, that the party to whom notice is given must pay, or accept payment of the difference or accept a satisfactory person in the room and stead of the party giving the notice, and discharge him and look to his substitute for performance of the contract.

"Rule 6 relates to margins, and we do not perceive that it has any bearing upon the question in this case.

"Rule 8 relates to settlements when there has been default in delivering or receiving cotton due on a contract. It provides that in such cases the seller making default shall settle at one quarter of a cent per pound above the average quotations for spot cotton of the day of delivery, and that a buyer making default shall settle at the average quotations for spot cotton of the day following, with the addition of one quarter of one cent per pound in favor of the seller; and it also provides that 'no defaulting party can claim settlement under this rule, except upon evidence that the default was unintentional, and not premeditated.'

"Liability for such a penalty for default, and a provision for this summary mode of making settlements in such cases, would seem to be a sufficient and salutary guaranty for the performance of contracts, and instead of affording facilities for, or furnishing evidence of, gambling on the turn of prices, seems well calculated to insure that good faith and promptness so indispensable in commercial transactions.

"Without noticing other provisions of the rules, it may be remarked that they seem to provide for real and not fictitious trade; that they provide against unreal transactions; and that so large a portion of the real business in the great cities is done on 'Change as to wholly forbid the conclusion that all contracts made on them are unlawful; and unless such conclusions could be reached, the contract involved here must be held to have been valid and lawful."

To the same effect is the holding of Judge COOLEY in *Gregory* v. *Wendell*, 40 Mich. 432.

See also, *Hatch* v. *Douglass*, 48 Conn. 116.

The doctrine announced in *Bibb* v. *Allen*, 149 U. S. 481, is in line with the foregoing authorities. The contract involved was also made on the New York Cotton Exchange, the rules and usages of which institution were held to have been incorporated in the contract.

Say the court:

"In entering into their arrangement, it is shown by the correspondence, and by other testimony in the case, that there was no agreement or understanding between the plaintiffs and defendants that the cotton sold for future delivery *was not in fact* to be actually delivered."

After a general statement that an agent can not recover, being *particeps criminis* in an illegal transaction, the court add:

"But the facts of this case do not bring the transactions in question within the operation of that principle, for the evidence set out in the bill of exceptions *fails to show* that either party to the transactions intended the same as wagering or gambling speculations. On the contrary, the undisputed testimony establishes that the sales were not wagers, but that the cotton was to be actually delivered at the time agreed upon. Bibb's own statement of the transactions does not disclose the fact that they were intended, even on his part, as gambling or wagering speculations. He certainly never disclosed to the plaintiffs, as his brokers, either in their correspondence or in their verbal communications, that he did not intend to deliver the cotton sold through them for future delivery. *In addition to this it is shown that the rules and regulations of the New York Cotton Exchange recognized no contracts except for the sale and purchase of cotton to be actually delivered. These rules and regulations impose upon the seller the obligation to deliver the cotton sold, and upon the purchaser the obligation to receive it*, except in certain specified cases, which have no application to the present case.

"It is well settled that contracts for the future delivery of merchandise or tangible property are not void, whether such property is in existence in the hands of the seller, or to be subsequently acquired. 2 Kent's Com. 468, and authorities cited in notes; Ben-

jamin on Sales, Am. Ed., 81, 82. *It is further well settled that the burden of proof is upon the party who seeks to impeach such transactions by showing affirmatively their illegality. Rountree* v. *Smith*, 108 U. S. 269; *Dykers* v. *Townsend*, 24 N. Y. 57; *Irwin* v. *Williar*, 110 U. S. 499, 507, 508. In this latter case (*Irwin* v. *Williar*) the trial court charged the jury that 'the burden of showing that the parties were carrying on a wagering business, and were not engaged in legitimate trade or speculation, rests upon the defendant. On their face these transactions are legal, *and the law does not, in the absence of proof, presume that the parties are gambling.* A person may make a contract for the sale of personal property for future delivery which he has not got. Merchants and traders often do this. A contract for the sale of personal property which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding if an actual transfer of property is contemplated. A transaction which on its face is legitimate can not be held void as a wagering contract by showing that one party only so understood, and meant it to be. *The proof must go further, and show that this understanding was mutual; that both parties so understood the transaction.*'" * * *

And the court adds, p 493:

"This court approved that charge as a correct statement of the law upon the subject of what constitutes a wagering contract. It is directly in point here, for the evidence *fails to show* not only that Bibb & Company intended it as a wagering contract, but it *fails to show* also that the plaintiffs so understood it. The testimony establishes that the plaintiffs did not, in fact, so understand it.

"It further appears that in the memorandum, or 'slip contracts' of sale actually made by the plaintiffs for the account of Bibb & Company, the sales were described as made 'subject to the rules and regulations of the New York Cotton Exchange.' Under these circumstances we are of the opinion that the testimony *fails to establish* that the contracts in question were wagering transactions, and therefore void. The testimony is so clear to the contrary that the court below, under the settled rules of this court, was certainly justifiable in not submitting that question to the jury; for if it had been submitted, and the jury found that the contracts were wagers, it would have been the duty of the court to set aside their verdict."

"The rules of the New York Cotton Exchange are not set out in the opinion in *Bibb* v. *Allen*, but if they may be presumed to be the same as set out in the opinion in *Sawyer, Wallace & Company* v. *Taggart, they permit a greater latitude for settlement according to differences than the rules of the Chicago Stock Exchange.*"

A recently hotly contested case through the Illinois courts, growing out of a series of transactions on the Chicago Board of

Trade, determines many questions involved in this case and incidentally touches upon a question of a rule of the board of trade, which, in its operation, is not unlike the clearing house of the stock exchange.

The case is *Warren & Co.* v. *Scanlon,* to be found in 59 Ill. App. 138, 68 Ill. App. 213 and 169 Ill. 142.

The defendant pleaded the statute against options; also gambling. The verdict of the jury on the first trial was in favor of the defendant and plaintiff appealed. The judgment of the lower court was reversed because the facts did not justify the inference of the jury that the intention of the parties was to settle according to differences in price.

In the Appellate Court the appellee urged (59 Ill. App. 141) that no delivery of grain was shown except in the " ringing up " process described in *Irwin* v. *Williar,* 110 U. S. 399, and claimed that no rule of the board of trade could bind appellee to accept such delivery unless he had actual, as opposed to presumptive, knowledge of the existence of such a rule.

Further claiming that the rule itself was illegal and void and that " *if business is transacted under it, the board of trade itself is nothing but a gigantic 'bucket shop.'* "

Judge CARTWRIGHT delivered the opinion of the court but did not pass upon this point.

When the case again came before the Appellate Court on an appeal by the defendant (verdict having gone against him), practically the same points were urged, and Judge LACEY, delivering the opinion of the court, says, 68 Ill. App. 217:

"The first instruction ignores the fact (as is claimed) *that the contracts themselves on the board of trade leave an option open to either party to receive or not to receive, to deliver or not to deliver, the grain.* We do not understand that the proof tended to show any such option with the board of trade.

According to the rules of the board of trade a purchaser of grain could make sale of as much grain as he had purchased, and the member of the board of trade making the sale or purchase would take the burden upon himself to see that the wheat when delivered on the purchase should be immediately turned over on the sale. He simply took this responsibility as the agent of his employer, his employer not being able to deal on the board of trade himself. *We do not think such a rule could be twisted into an optional sale by any fair reasoning. If so, transactions under the rules of the board of trade would be in their nature per se gambling transactions, which we do not understand that any court has ever holden.*"

The judgment of the trial court being approved, the defendant

prosecuted his appeal to the Supreme Court, 169 Ill. 142, Mr. Justice Carter delivering the opinion of the court and re-affirming the judgment.

Of the opinion of the Circuit Court of Appeals in this case (Tr. p. 171) our criticisms are both general and specific.

I.

General Criticisms.

1. It affects to discover from the evidence, combined with the rules of the stock exchange, an *intention* of the parties to gamble. We respectfully insist that the *intention* of the parties in transactions of this kind *is a question of fact*, to be pleaded as a fact, and so found by a jury, or a master, or the trial court.

Bartlett v. *Smith*, 13 F. R. 263.

In an article in the Central Law Journal by Mr. Elliott, of Indianapolis (Vol. 22, p. 271), it is said:

"Intent and motive are two different things, the motive being that which causes or induces the act, and the intent being the purpose for which it is done; but the two words are often used interchangeably in the authorities, and the distinction, while proper, is not always a necessary one. * * * Intention or motive being a state of mind internal and invisible except through outward manifestations, its existence must usually be a matter of inference or presumption from the outward or visible acts and manifestations, which serve to indicate more or less clearly and conclusively the particular intention. * * * Formerly, therefore, when parties were not competent witnesses, the usual, and in general, the only way of proving intent was by evidence of such conduct, or such outward acts and circumstances as tended directly, or indirectly, to show the particular intent. But where parties are allowed to testify, it is now generally held that the intention is, in a sense, a fact to be proved as any other fact, and that, when material, a party may testify as to his own intention. This seems in accordance with common sense, for no one can tell better what an act was intended to accomplish, or what motive prompted it than the person who did the act. * * *

The inference to be drawn from the acts and circumstances is usually one of fact for the jury to determine; but there are some instances where, as experience has shown, there can be but one

reasonable inference, which *of necessity* arises from the facts as they stand otherwise unexplained. *In such cases the law itself fixes and determines the inference, which is called a presumption of law.*"

The learned author then proceeds to give instances of legal presumption, as follows:

"Thus, from the uttering of a forged document, the law presumes an intent to defraud the person who would naturally be affected thereby. So where one sets fire to a building, the presumption is that he intended to destroy it, and also that he intended to injure the owner. So, also, where a baker delivers adulterated bread to a public asylum, the presumption is that he intended it to be eaten. And again, when one man kills another by the voluntary use of a deadly weapon, the law presumes that the killing was intended. In such cases it may be said, *res ipsa in se dolum habet*—the acts are evil and show a wrong intention in themselves. *But in most cases the intention is not so clearly or conclusively shown that the law itself can draw the inference*, and it is necessary to prove acts and circumstances from which the court or jury may draw the inference as a fact. As said in a recent case (citing *Burke* v. *State*, 71 Ala. 377), '*intention is an inferential fact to be drawn by the jury from proven attendant facts and circumstances.*'"

Says Mr. Wharton, in his work on Evidence, Vol. 1, Sec. 508:

"A witness, also, is not to be permitted to testify as to the motives by which another person is or has been actuated. Motives are eminently inferences from conduct. The facts from which the inferences are to be drawn are to be detailed by the witnesses; *for the jury the work of inference is to be reserved.* Yet where a party is examined as to his own conduct, he may be asked as to his motive, his testimony to such motive being based, *not on inference*, BUT ON CONSCIOUSNESS."

(That direct testimony of intention in this class of cases outweighs mere inference, see *In re Taylor Estate*, 43 Atl. R. 973.)

The Court of Appeals, notwithstanding no allegation in the pleadings challenged the issue, notwithstanding the parties to the transaction were not interrogated directly as to their intent and motive, notwithstanding their consciences were not "probed" under the sanction of an oath, notwithstanding that *from the very nature of the pleadings* no such inquisition could be had, notwithstanding the direct finding of the master (made, not in response to the pleadings or proofs, but to the argument of defendants' counsel), that there was no evidence from which *he* could infer an intention to gamble, notwithstanding that this finding of the master was practically affirmed by the trial court—we say, notwithstanding all this, the Circuit Court of Appeals, usurping the functions of the master or a jury, *inferred from collateral circumstances that there was a mutual*

understanding and intention from the beginning to gamble, AND GAVE THIS INFERENCE OF FACT THE SOLEMNITY OF A PRESUMPTION OF LAW.

We respectfully insist that having only appellate jurisdiction, the Circuit Court of Appeals was bound by the findings of the master, concurred in by the trial court, unless some obvious *error* intervened in the application of the *law*, or some serious or important *mistake* in a consideration of the *evidence* had been made; and we cite in support of this postulate:

Crawford v. *Neal*, 144 U. S. 585.
Furrer v. *Ferris*, 145 Id. 132.
Telighman v. *Proctor*, 125 Id. 136.
Kimberly v. *Arms*, 129 Id. 512.

2. Concurring in the language of the opinion that equity looks to the intent rather than the form, and that one who seeks relief must come open-handed, with clean hands, and that a court of equity has the right, and is charged with the duty, to probe the conscience of any litigant, we respectfully insist that to "probe" a conscience *involves an inquiry concerning it;* in the absence of which inquiry the Circuit Court of Appeals was without precedent or authority to ascribe of their own motion an unlawful intent to a party litigant *arising out of circumstances and facts equally consonant with a lawful intent.*

The opinion of the Circuit Court of Appeals seems to us to *assume* an unlawful intention on the part of every one connected with the transaction in all its phases, and to vindicate the assumption by reference to portions of the evidence and rules of the exchange which would not indicate an intention to the contrary; whereas we respectfully insist that the court *should start with the presumptions that the parties did not intend an unlawful act and did not intend to gamble, and that the machinery of the Stock Exchange Clearing House was, like the machinery of every other clearing house, devised and inaugurated for the sole and only purpose of facilitating the transaction of lawful business; which presumptions we insist would have led the honorable court to a very different conclusion.*

3. We have carefully studied all the cases cited by the Circuit Court of Appeals in support of its conclusions and unhesitatingly affirm that not one of the cases cited militates against the doctrine of the cases from which we have been quoting, and that *not one of said cases is applicable to the case at bar.* Except the cases cited in the opinion as to the Illinois statute prohibiting optional contracts—which subject will be presently considered—it may be observed of them:

First. *In every case the defense of gambling was specially pleaded,* alleging a mutual understanding and agreement between the par-

ties to settle according to differences in prices, without delivering the subject-matter of the contract.

Second. That where this issue of fact was thus presented by the pleadings, an assertion on the one side and a denial of gambling on the other, the courts *in every instance* submitted the question to the jury *as a question of fact to be determined by a probing of the consciences of the parties under oath as to their real intention and understanding, and the adduction of testimony as to every conceivable fact from which an intention could be inferred.*

Third. That in several cases the Supreme Court simply affirms the verdict of a jury or the findings of the lower court *without giving any intimation as to the particular facts elicited upon the trial.* Such are the cases of:

Pickering v. *Cease*, 79 Ill. 328.
Lyon v. *Culbertson*, 83 Ill. 33.
Pearce v. *Foote*, 113 Ill. 228.
Cothran v. *Ellis*, 125 Ill. 496.

Concerning these cases Judge GARY, in *Postal Tel. Co.* v. *Lathrop*, 33 Ill. App. 402, states as follows:

"In the cases in this State, *Pickering* v. *Cease*, 79 Ill. 328; *Lyon* v. *Culbertson*, 83 Ill. 33; *Pearce* v. *Foote*, 113 Ill. 228; *Cothran* v. *Ellis*, 125 Ill. 496, and perhaps some others, the Supreme Court have not settled the facts upon which they animadverted, as they appear in this record."

These cases, of course, can throw no light on the case at bar further than the announcement of the general principle that contracts for future sale in which, according to the understanding and intention of the parties, the goods contracted for are not to be delivered but a settlement is to be made according to differences in price, are gambling contracts, and that gambling contracts are void.

Fourth. That in all other cases cited in the opinion of the Court of Appeals the intention of the parties was found *as a fact:*

1. By the sworn, direct testimony of one of the parties.
2. Corroborated by circumstances.

Fifth. IN EVERY INSTANCE THE INFERENCE DRAWN FROM SUCH CIRCUMSTANCES IS DUE TO THE INCONGRUITY OR INCONSISTENCY BETWEEN THE FACTS PROVEN AND THE INTENTION CLAIMED. They show, for instance:

1. A *series* of transactions between the same parties covering a period of several months, involving *a large number of sales and purchases, all for future delivery, in which not a single commodity was delivered or tendered.*

2. That the aggregate number of such sales and purchases would foot up an enormous quantity of grain or pork or other

commodities, aggregating in value hundreds of thousands, and in one instance cited, millions of dollars.

3. That the parties purporting to purchase or sell such commodities *could have no possible use for them*, inasmuch as they were in *entirely different employment*, being merely *mechanics, doctors, lawyers*, or, if grain dealers, engaged in the actual manufacture of meal and flour, *with a very small capital.*

Sixth. *That the financial status of these parties would not, within the range of sanity, warrant them in actually buying or selling such quantities and in such amounts.*

Seventh. That in every instance where a particular transaction was pronounced by the court to be gambling it was due to a most reasonable inference, *from just such facts as we have enumerated*, UNDER PLEADINGS RAISING THE ISSUE AS A QUESTION OF FACT.

Eighth. That where the facts developed were not so palpably inconsistent with an actual intention to receive or deliver, the juries and the courts have found the transaction to be valid and binding, and in one instance, at least (*Cothran* v. *Ellis*, 125 Ill. 496), the Supreme Court was constrained to affirm a finding in favor of the plaintiff, notwithstanding testimony from which the jury would have been amply justified in finding for the defendant.

And in *Bibb* v. *Allen*, 149 U. S. 481, the Supreme Court of the United States not only justified the lower court in instructing in favor of the plaintiff where the facts were infinitely more dubious than the facts in this case, but went further and declared that if there had been a finding in favor of the defendant the judgment would have been reversed.

Ninth. The authorities all show that the line of demarkation between legitimate speculations, which the law upholds, and gambling in prices, which the law condemns, *depends wholly and altogether upon the mutual intention and understanding of the parties existing from the beginning*—a most difficult question of fact, which must be affirmatively pleaded by the defendant, who thereupon assumes the burden of proof.

In not one of the cases cited in the opinion of the Circuit Court of Appeals has any court assumed or imputed an intention which all the parties to a transaction have disclaimed.

Specific Criticisms.

1. While the point is not pertinent to the particular question under discussion, we can not refrain from pointing out that the very first proposition laid down by the honorable court does not go far enough. The opening words are as follows:

"Except for the fund or deposit alleged to constitute security

for performance of the contract in question, a remedy for a breach rests at law, and equitable jurisdiction depends upon the existence of such fund to be administered or charged."

We respectfully submit that petitioners' standing in a court of equity does not depend alone upon the administration of a trust fund. The contract of August 3rd sued upon was for the sale of 1150 shares of the stock of the Diamond Match Company, in which contract, however, the petitioners were interested only to the extent of 700 shares.

If petitioners had attempted to spilt up that contract, Jamieson & Company could have objected that they were being subjected to several suits, whereas their liability ought to be determined in a single action.

See *Phillips* v. *Edsall*, 127 Ill. 535.

Furthermore, the contract was between Schwartz, Dupee & Company and Jamieson & Company, and the trust fund was deposited by them. The undertaking of the stock exchange was with the above named parties. The doctrine that an undisclosed principal is bound by the acts of his agent would hardly apply to the stock exchange, which was acting, not as an agent of either party, but as a trustee for both.

See *National Bank* v. *Insurance Company*, 104 U. S. 54.

2. In searching the record for evidence of an intention to gamble, the opinion quotes from the principal brief of petitioners' counsel the language in which they attempted to formulate the terms of the contract of employment between complainants and their agents, Schwartz, Dupee & Company.

It is to be noted in the first place that this does not involve *any conduct of the parties or course of dealing between them, and could not, therefore, be a fact or circumstance from which an inference of intention could be evolved.* More particularly is it to be noted that it was simply an attempt *on the part of counsel* to formulate in words what any authority to deal on the stock exchange, in pursuance of its customs and regulations, must include; in other words, it was an attempt to explain the *rationale* of the daily novations and substitutions made in pursuance of the rules.

Our language was, perhaps, not as clear as it should have been. We have attempted in this application a similar explanation but in different language. We have shown, we hope, that these daily novations and substitutions do not involve any element of risk, can not by any possibility result in loss or gain, injury or advantage to the person consenting to them, do not absolve the parties from their obligation to deliver or receive the number of shares

contracted for at the time specified, do not transmute a contract for absolute sale into an option or privilege contract, do not, in short, afford any motive or inducement, so far as individual interest is concerned, to *consent* to such mutations and novations, and that *the only possible object is to accommodate the stock exchange as an institution, and to make easy its bookkeeping and the transaction of its business.*

How the mere clicking of this machinery, not even heard by the client, can convert a primarily lawful transaction into an unlawful transaction, we are utterly unable to understand; for it is nothing to the client, does not affect him one way or the other, adds nothing to and detracts nothing from his original obligation, contains no element of risk, affords no motive, therefore, for him to gamble.

See *Scanlan* v. *Warren*, 59 Ill. App. 138; same case, 68 Id. 213; same case, 169 Ill. 142.

Third. The opinion refers to the correspondence between the petitioners and their brokers where the former make inquiries concerning the "difference" demanded to change to August account, and the change is then ordered and reported as made by allowing the "difference."

These messages were sent on the 25th day of July. It will be observed that the first message was a direct order to change to August account at 2½, with the added phrase: "If you can not do it, let us know at once."

The next message, sent the same day, states:

"You sent us the difference this morning at 2½. At what difference can you do it now?"

On July 27th the petitioners ordered their brokers, as follows:

"Change 200 more Diamond Match at two per cent or better."

And on the same day the brokers wired petitioners as follows:

"We changed the 200 match at 2¼ difference. Will give you PRICE later."

Now what does this mean?

Every broker in the world knows that it does not have the meaning which the opinion of the Circuit Court of Appeals would bestow upon it. Indeed, the very language of the telegrams militates against the inference the Circuit Court of Appeals would make.

These telegrams show:

1. That instead of being compelled, according to the terms of their contract, to deliver the stock on the 31st of July, the petitioners wished to have the time extended to the 31st of August.

What inference would a jury make from this request? If the petitioners recognized no obligation to deliver on the 31st of July

why should they manifest any desire to have the time extended to August 31st? If they knew the purchaser was not required to accept, why should they expect compensation for extending the day of delivery?

2. The telegrams not only indicate a willingness on the part of petitioners to postpone the day of delivery, but they manifest a desire on their part to receive compensation for the accommodation. What inference would a jury draw from this? Why expect pay for an accommodation if there was no obligation?

3. The telegrams even indicate the price that petitioners were willing to receive for the accommodation, and the word "difference," used by the petitioners, is simply synonymous with the word "price." They might just as well have inquired on what terms, or at what price could the accommodation be obtained; but they express themselves in terms of percentages. Even their telegram, "Change the five hundred at two cents or better," meant two per cent or better.

It was in reference solely to the cost or price of the accommodation which they were willing to extend that the word "difference" was used. Is not this obvious from the telegrams?

4. If the privilege of postponing acceptance to August 31 had not been granted by the petitioners, or if the price offered for the accommodation on their part had been less than petitioners were willing to accept, what, presumably, would have been the result? Clearly, the petitioners would have been obliged to make delivery on the 31st of July, and the purchasers, whoever they might be, would be obliged to accept the shares tendered or take the consequences of their breach of contract.

5. But if petitioners had instructed their agents to close out the deal absolutely, and settle according to "difference in price," this would afford very slight inference that the original intention of the petitioners, to say nothing of the intention of the first purchaser or the ultimate purchaser, or any intermediate purchaser, was to gamble, and no inference whatever that the original understanding and agreement was to settle in differences.

A thousand and one contingencies can be surmised that would make this the wise and proper course to pursue.

6. The fact remains, however, that the contract was not settled by the payment of differences, but that the time of delivery was extended to the 31st of August, and that the petitioners received a consideration for the accommodation.

Fourth. The opinion further states that there is neither averment nor pretense that the petitioners had or controlled any shares of the stock, or procured, or intended to procure, the same for delivery.

What rule of pleading makes proper, much less requires the

allegation in a bill that at the time of entering into a contract for sale petitioner was the owner of the subject-matter of the contract, or had means of procuring the same, or intended to procure the same? Is not this transposing the onus of proof?

According to the Circuit Court of Appeals' implication the demurrer to petitioners' bill should have been sustained for lack of these allegations; but if the law starts out with the presumption that the contract was lawful it must, of necessity, include the presumption that the petitioners either had the stock, or could procure it, or intended to procure it, for delivery. Can an inference of unlawful intention arise from the absence of testimony showing affirmatively a lawful intent?

Fifth. The opinion further states that "it is conceded that they (petitioners) had no stock at any time in the hands of their brokers, and no property in the stock of which pretended tender and sale was made after the alleged default."

First protesting that no inference of unlawful intent is warranted from this alleged fact, and further protesting that the testimony does not show but that the petitioners had the shares of stock in New York, we make bold to assert that the statement does not conform absolutely to the testimony. That petitioners' brokers had the stock ready to be delivered at any time, is a reasonable inference from the fact that it was furnished on the day of delivery; that this stock was at the command and disposal of the petitioners is also reasonably inferable from the fact that it was tendered in their behalf to the defendants, Jamieson & Company, and by the all-important fact that when tender was made the title to the stock vested then and there, *eo instanti*, in the defendants, Jamieson & Co. *Thenceforth it was their stock*, to be held by the petitioners or their brokers, subject to defendants' orders on complying with their contract, or to be sold by petitioners or their brokers as *quasi* agents of the defendants, and the proceeds applied on account.

This vesting of title on tender is because, in Illinois, the 17th section of the Statute of Frauds is not in force. See

Rhea v. *Riner*, 21 Ill. 256.
Wade v. *Moffett et al.*, 21 Ill. 110.
Seckel v. *Scott*, 66 Ill. 106.
Borrow v. *Window*, 71 Ill. 214.
Owens v. *Weedman*, 82 Ill. 409.

Sixth. The opinion refers to the rule of the stock exchange making distinct provision for closing contracts by paying the difference in market price, and further states that the contract in question was made with reference to such rule and by parties unquestionably acquainted with it, and from this rule itself the Circuit Court of Appeals infer an understanding of the parties that only a settlement of differences in price was contemplated.

We submit that the rules of the stock exchange should be con-

strued together, and, if possible, they should be construed as contemplating the transaction of lawful business.

Art. 15, Sec. 1, provides: "Any member who fails to comply with his contracts, or becomes insolvent, shall be suspended until he has settled with his creditors, etc."

Article 17, Sec. 1, provides as follows:

"No fictitious sales shall be made. Any member contravening this section shall, upon conviction, be suspended by the governing committee."

Section 2 provides:

"Any member who shall make fictitious or trifling bids shall, upon conviction, be subject to suspension, or such other penalty as the governing committee shall impose."

Article XVIII provides:

"In all deliveries of stocks, bonds, etc., the party delivering shall have the right to require the purchase money to be paid at the time and place of delivery."

Article XXIX provides:

"Any member of this exchange who is interested in, or associated with, or whose office is connected directly or indirectly by wire or other method or contrivance, with any organization, firm or individual engaged in the business of dealing in differences or quotations on the fluctuations in the market price of any commodity or security, without a *bona fide* purchase or sale of said commodity or security, in a regular market or exchange, shall, on conviction thereof, be deemed to have committed an act or acts detrimental to the interest and welfare of the Exchange."

Article 4 of the By-laws provides:

"No sale of securities shall be made on which a deposit shall be offered as the limit of liability." * * *

Article 7, Sec. 1, provides:

"All deliveries of securities must be made between 11 A. M. and 1:30 o'clock P. M., or the buyer may demand that they shall lie over until the next day without interest, when they shall be delivered before 10:30 o'clock A. M., and when deliveries are not made by that time the contract may be closed under the rule after due notice to the defaulting party as provided in Art. XVII of the by-laws. * * *

In the absence of any notice or agreement, the contract shall continue without interest until the following day, when the same rule shall apply. In every case of non-delivery, however, the party in default shall be liable, in addition, for the damages that may accrue."

Article XVII provides:

"Should any member neglect to fulfill his contract on the day

it becomes due, the party or parties contracting with him shall, after giving notice as required by Sec. 2 of the preceding article, employ an officer of the board to close the same forthwith in the exchange by purchase or sale, as the case may require, unless the price of settlement has been agreed upon by the contracting parties. In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under the rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name of the member defaulting, as well as that of the member giving the order shall be announced. No order for the purchase or sale of securities under this rule shall be executed unless made out in writing over the signature of the party giving the order, who shall state the reason therefor; and it shall be the duty of the officer who executes the order to indorse thereon the name of the purchaser or seller, the price, and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall within twenty-four hours, ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction; if not, the secretary shall report the default to the president. The duty devolved upon the officers of the exchange under this rule shall be performed without charge. No party shall be permitted to supply offers to buy or sell securities closed for his account under the rule; and when a contract is closed under this rule any action of the defaulter, direct or indirect, by which the prompt fulfillment of such contract is delayed, hindered or evaded, to the detriment of the other contracting party, shall subject the offending party to suspension for not less than thirty days, in the discretion of the governing committee, by a vote of two-thirds of the members present at the meeting. When contracts are closed out under the rule, any member supplying the bid or offer, and not duly receiving or delivering the stock, as the case may be, renders himself liable to prosecution under this article. Should any stock thus sold not be delivered until the next day, the contract shall continue, but the defaulting party shall be liable to pay such damage as may be assessed by the arbitration committee," etc.

Under CLEARING HOUSE RULES, Sec. 2 (Tr. p. 141) provides:

"Deliveries of cash stock or transactions for 'the account' shall be made on the last day of each month. Provided, however, should the last day of any month occur on a holiday or on a day when the exchange is closed for business, then in that case deliveries shall be made on the first day *preceding*."

Sec. 6 (Tr. 142) provides:

"Stock balances, as shown by the statements, rendered for cash

settling days, must be delivered and paid for at the closing bid price of the previous day, as per manager's notices, before 1:30 P. M. Provided, however, if satisfactory evidence is shown the clearing house committee that the cash stock is on hand in New York, or in transit for Chicago, three days' grace will be given the seller to make the delivery with interest, failing in which the clearing house committee shall cause to be purchased for account of delinquent, said stock, in whichever market in their judgment seems best; and the party so failing to deliver shall be held responsible for all loss or damage arising therefrom; but when a failure to receive or deliver occurs, nothing in these notifications shall be construed to relieve the last contracting parties to the transaction from the liabilities to each other."

Section 8 provides:

"Whenever a member is unable to meet his contracts or transactions made for "the account," he shall make a statement of his transactions, to be audited that day, and deliver it to the manager or presiding officer of the exchange."

Section 10 provides:

"The same rule as to notice, time and place, that govern defaults in other contracts shall apply to transactions for "the account."

The inference made by the Circuit Court of Appeals from the rule quoted by them would reduce the foregoing rules prohibiting fictitious sales, and denouncing penalties for their violation, to a mere *brutum fulmen*. The opinion of the Court of Appeals practically finds as a fact that the rules of the stock exchange *contemplate only* gambling transactions and *require* parties to settle by payment of differences; *for, if the rule in question, while affording facilities for gambling, gives equal facilities to those lawfully inclined to prosecute their bargains to a lawful conclusion, no inference of gambling ought to be drawn from the rule itself.* THE RULE WOULD AFFORD NO BASIS FOR INFERENCE OF INTENTION ONE WAY OR THE OTHER.

But we respectfully insist that the honorable court misapprehended the meaning and purpose of the rule. *It purports to provide a remedy* FOR THE BREACH OF CONTRACT *by any member of the exchange and fixes a penalty for such breach.*

In this respect it differs in no wise from a great many important contracts entered into between individuals. It is a most just rule. The measure of damages which it prescribes for breach of contract is precisely the measure of damages which the law itself would prescribe.

The members of the stock exchange could not assume that every contract made upon its floors would be faithfully observed. They were, on the contrary, bound to assume that contracts would

be broken, *and if they assumed this they had a right, for the internal harmony and autonomy of their institution, to prescribe what, according to their sense of justice, should be the penalty or measure of damages, and in determining what this measure should be they copied from the law.*

To infer, *as a matter of fact,* an original understanding and agreement of the parties to settle their contracts by the payment of differences in price, simply because the rules prescribe that upon breach of contract the party breaking the contract shall pay certain damages (and these damages precisely the same as the law would inflict) *is, we submit, to infer an unlawful intention from a lawful act.*

The rule which the honorable court evidently had in mind is article 17 of the by-laws. It starts out by saying:

"*Should* any member neglect to fulfill his contract *on the day it becomes due,*" etc. Would it not be inferred from this language that the member was ordinarily *expected* to fulfill his contract?

The rule further says: "Should any stock thus sold *not be delivered until the next day* the contract shall continue, but the defaulting party shall be liable to pay such damages as may be assessed by the arbitration committee."

Why talk about the delivery of stock if no delivery of stock is contemplated by the rule?—if they are dealing in figments or abstract numbers?

But, as already observed, these rules are only intended for the discipline of the members, who alone are permitted to deal upon the floor of the exchange, but who, in nearly every instance, are dealing not for themselves, but for others.

Seventh. The language of the opinion shows a misapprehension of the word "option," and of the purposes of the Illinois statute, declaring that:

"Whoever contracts to have or give to himself or another *the option to sell or buy* at a future time any grain or other commodity, etc., * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year or both; and all contracts made *in violation of this section* shall be considered gambling contracts, and shall be void." (1 Starr & Curtis An. Stat. 2d Ed. pp. 1,293, 1,298, Sec. 130.)

Now, we take it that no contract which *on its face* purports to be a contract for the sale of a commodity to be delivered at a future time *certain* has ever been called an option contract. The statute was aimed at "puts" and calls."

See *Pixley* v. *Boynton*, 79 Ill. 351, which also defines these terms as follows: "A 'put' is a *privilege* to deliver or not deliver grain or other commodity; a 'call' is a *privilege* to call or decline to call for such delivery."

It must be obvious that the "privilege" here spoken of is not

the mere privilege *to break a contract*, for that "privilege" inheres in every contract—with certain legal penalties for the exercise of it; but the privilege meant is the privilege to deliver or not to deliver, to receive or not to receive, *without a breach of contract;* in other words, THE "PRIVILEGE" IS THE VERY THING CONTRACTED FOR.

That such a contract would be valid at common law goes without saying. A contract to gamble in differences of price, however, would now-a-days require no statute to render it void. Therefore the language quoted in the opinion from *Schneider* v. *Turner*, 130 Ill. 28, to the effect that something more was intended by the legislature than the prohibition of gambling is eminently correct.

As already observed, the Legislature had in mind the option contracts known as "puts" and "calls," but the effect of the statute has been more far reaching, perhaps, than the Legislature contemplated.

For instance, if a manufacturer, expecting a large order for goods, should go to a coal merchant and make known that in a certain contingency he would want a large amount of coal, but in another contingency he would not need any, and should enter into a contract with the coal merchant, for a consideration in hand paid, to take a certain amount of coal at a particular date *or not, as he might elect*, the common law would sustain the contract, for the motive which inspired it would be worthy and the consideration paid for the option presumably adequate. But just such a contract has been pronounced void under the Illinois statute.

See *Corcoran* v. *Lehigh & Franklin Coal Co.*, 138 Ill. 390.

If a clothier, for a consideration in hand, should agree to deliver a suit of clothes to a customer on or before Monday next, would it be pretended that such a contract is obnoxious to the Illinois statute against options? Or if, at the time appointed for delivery, the merchant should wait upon his customer and desire an extension of the time till the following Monday, agreeing in consideration of such extension, to a reduction in the price, would it be contended that such a contract was obnoxious to the Illinois statutes against dealing in options?

Says Chief Justice SCOTT, in *Pixley* v. *Boynton, supra*, of a contract for delivery "on or before" the last day of July:

"Under such a contract, as we understand the evidence, all the option the seller has is the privilege to deliver the grain at any time before the maturity of the contract. This is nothing more than a time contract, which is regarded on the board of trade and elsewhere as a legitimate and regular contract. Time contracts in relation to grain, as well as other commodities, are of daily occurrence, and must necessarily be in commercial transactions. * * * The

contract between the parties to this transaction was not an optional one, in the sense of 'puts and calls.' The only option the seller had was as to the time of the delivery. The legal effect of his agreement was that he should deliver the grain contracted to be sold within a limited period."

In the case at bar there was not even an option as to time of delivery. The stock was not required to be accepted before the August account day, which was the last day of the month.

The case of *Schneider* v. *Turner*, 130 Ill. 28, was clearly an option contract. The written contract was as follows:

"Chicago, November 11, 1885.

In consideration of one dollar ($1.00) and other valuable considerations, receipt of which is hereby acknowledged, I hereby agree to sell to George Schneider, Walter L. Peck and Ferd W. Peck, seventeen hundred and eighty-six (1786) shares of the capital stock of the North Chicago City Railway, at six hundred dollars ($600) per share, *if* taken on or before the 15th day of December, 1885.

(Signed) V. C. TURNER."

No where in this contract is there a promise on the part of Schneider et al. to take the shares at any time. If they exercised the privilege before the 15th day of December, 1885, the seller undertook and agreed to deliver a certain number of shares at a certain price. But that it gave Schneider *et al.* an option *to buy or not, as they might elect*, seems too plain for discussion.

It was contended by the appellant that the contract was an executory contract of sale and on the part of the appellee that it created a mere option. The court say, p. 36:

"Looking at the instrument itself, it seems impossible to give it the construction contended for by appellants, without violating plain and well-settled rules of law applicable to all instruments in writing. * * * The construction contended for ignores the first clause of the instrument entirely, and gives to the word 'if' in the last sentence, an entirely different meaning from that ordinarily attached to it, thus making the contract in effect read, 'I hereby agree to sell to George Schneider, Walter L. Peck and Ferdinand W. Peck 1786 shares of the capital stock of the North Chicago City Railway stock, at $600 per share, to be taken (or they to take the same) on or before the 15th of December, 1885.' *So read, it would undoubtedly under the authorities cited, be an absolute contract of sale of the shares of stock.* * * *

The plain, unambiguous meaning of the contract (treating it as such) is, that appellants paid appellee a valuable consideration for the refusal or privilege to buy 1,786 shares of stock of the North Chicago City Railway Company at $600 per share, at any time on

or before the 15th of December, 1885—a contract heretofore of frequent occurrence in commercial transactions, perfectly legal and enforceable at common law. In the absence of section 130, no one, it seems to us, would hesitate to pronounce this a contract to give to appellants the option to buy railroad stock at a future time."

This identical section of the Illinois statute was passed upon by this court in *White* v. *Barber*, 123 U. S. 392. The syllabus of this case reads as follows:

"A *bona fide* contract for the actual sale of grain, deliverable within a specified future month, the only option in which is an option in the seller to deliver it at any time within such month, is not a gambling contract, within the meaning of Sec. 130 of Chap. 38 of the Revised Statutes of Illinois. (Hurd's Ed. of 1883, p. 394; do. of 1885, p. 405.)

"W claimed to recover from B, by a suit in equity, money which he had put into the hands of B, as a broker, to be used by him in transactions which W alleged were wagering contracts, because they were sales of wheat in regard to which both W and B did not intend there should be any delivery of the wheat: Held, that what W did in connection with the transactions was inconsistent with such claim; that B had no such understanding; that the sales of wheat were lawful; and that W was not entitled to recover the money which B had paid out.

"B having paid out the money in settlement of the sales according to the rules of the board of trade of Chicago, was not a "winner" of the money from W, within the meaning of Sec. 132 of Chap. 38 of the Revised Statutes of Illinois. (Hurd's Ed. of 1883, p. 394; do. of 1885, p. 405.)"

STARTING WITH THE PRESUMPTIONS THAT THE PARTIES WERE INNOCENT OF AN UNLAWFUL INTENTION, AND THAT THE MACHINERY OF THE STOCK EXCHANGE CLEARING HOUSE WAS DEVISED FOR THE PURPOSE OF FACILITATING LAWFUL EXCHANGES; AT WHAT STAGE OF THE TRANSACTION DID IT BECOME EVIDENT THAT THE PARTIES INTENDED TO GAMBLE, AND WHEN AND WHEREIN DOES IT APPEAR THAT THE MACHINERY OF THE CLEARING HOUSE WAS INADEQUATE TO CONSUMMATE A LAWFUL CONTRACT IN LEGAL AND PRACTICAL EFFECT AS CONTEMPLATED BY THE PARTIES, AND AT WHAT STAGE OF THE PROCEEDINGS WAS THE CONTRACT OF SALE AND PURCHASE ABSOLUTE CONVERTED INTO AN OPTIONAL CONTRACT TO SELL OR NOT TO SELL AT THE ELECTION OF THE PARTIES?

A brief analysis of the transactions from July 16 and July 20, 1896, to August 3, 1896, will show that the intention of the parties was throughout lawful and the contract of sale absolute.

First. In entering into the contract of August 3, 1896 (the contract here sued upon), is there any proof in the record that

either Schwartz, Dupee & Company or Jamieson & Company intended to gamble?

1. There is nothing on the face of the contract to indicate such an intention.

2. Neither party to the contract has testified in the case that such was his intention.

3. No such claim has been made even in the pleadings.

4. Such an intention would overthrow the legal presumption of innocence and ought not, therefore, to be indulged in the absence of testimony.

5. Being both members of the stock exchange, Schwartz, Dupee & Company and Jamieson & Company would be presumed to have contracted with reference to its rules, and an intention to gamble would contravene the rules and make the offenders liable to expulsion.

6. Furthermore, Jamieson & Company and Schwartz, Dupee & Company *were not contracting on their own behalf;* they were each representing undisclosed principals. In making themselves liable for such undisclosed principals, they had presumably taken the precaution to protect themselves against loss by requiring ample security. IF IT WAS THE *bona fide* INTENTION OF THEIR PRINCIPALS TO BUY AND SELL, THERE COULD NOT BE, IN THE NATURE OF THINGS, AN INTENTION ON THE PART OF THE AGENTS TO GAMBLE.

7. And even if their principals intended to gamble, it would not follow that their brokers, making themselves individually liable on their principals account, would share such intention; for it would not only contravene the rules of their organization and so make them liable to expulsion therefrom, *but it would vitiate their security, making them liable for any money of their principals lost in the transaction.*

8. So far as the intention of Schwartz, Dupee & Company and Jamieson & Company is concerned, *it would obviously not be to their interest, in any aspect of the case, to gamble.*

Second. Did W. H. & J. H. Moore, for whom Jamieson & Company claim they were acting, intend to gamble? Neither of the Moores was a witness in the case, nor was it claimed by Jamieson & Company on their behalf that they, or either of them, intended to gamble.

We have in the answer of Jamieson & Company the simple assertion that in the contract of August 3 they were acting for W. H. & J. H. Moore. We have in evidence the bare fact that when tender of stock was made to Jamieson & Company on the 31st of August, they refused to receive it because the Moore Brothers, for whom they had acted, would not receive it from them. Why the Moore Brothers would not receive it is a matter of conjecture.

There is certainly no evidence that they, or either of them, intended to gamble.

Third. Did any intermediate purchaser between July 16 and August 3, intend to gamble? The names of these persons could not be traced except from examination of the private books of the brokers. The result of such examination was stipulated into the record and can be found on page 76, *et seq.*, of the transcript. No person named in this stipulation was examined as a witness, or his intention sought to be discovered. There is, therefore, no evidence that any intermediate purchaser intended to gamble.

Fourth. Did Henry Clews & Company intend to gamble? Their intention in the premises has not been made an issue in the case; no member of the firm was called as a witness; no other witness was interrogated on the point. So far as *oral* testimony is concerned, there is no evidence of an intention on the part of Henry Clews & Company to gamble.

Fifth. Was there any circumstance developed in the testimony from which an intention of Henry Clews & Company to gamble could be reasonably inferred—any course of dealing covering any period of time, anything in the financial status or usual business of the petitioners that would make a transaction of the kind incongruous? The testimony shows that the usual and ordinary business of the petitioners was the buying and selling of corporate stocks; that they should have sold the particular stock, therefore, was neither out of place nor out of character. Whether at the time of making the sale they actually owned the stock to answer to it, does not appear; and we respectfully submit that it does not matter. That they had the means of procuring the stock is pretty evident from the fact that it was tendered, and that the title thereto when tendered passed to Jamieson & Company. Indeed, it was one of the duties of their brokers, Schwartz, Dupee & Company, under their contract of employment, to furnish the stock in the first instance.

See *Markham* v. *Joudon*, 41 N. Y. 235–239.

Was it the original intention of Clews & Company not to deliver the stock, even though they might own or control it? The evidence is likewise silent on this point, and in view of the authorities, likewise immaterial. BUT THAT THERE COULD BE NO MUTUAL UNDERSTANDING AND AGREEMENT BETWEEN CLEWS & COMPANY AND ANY PURCHASER, MEDIATE OR IMMEDIATE, ORIGINAL OR ULTIMATE, NOT TO DELIVER THE NUMBER OF SHARES CONTRACTED FOR, IS ABSOLUTELY CERTAIN, FROM THE FACT THAT HENRY CLEWS & COMPANY DID NOT EVEN KNOW WHO SUCH PURCHASERS WERE.

Sixth. Was there, then, anything in the documentary evidence or the rules and customs of the stock exchange which indi-

cated an intention to gamble? Let us commence at the beginning.

On the 16th day of July, 1896, complainants wired their brokers, Schwartz, Dupee & Co., as follows:

"Sell 500 Diamond Match at 220½ for account."

On the same day Schwartz, Dupee & Co., notified the complainants as follows:

"Sold 500 Diamond Match at 221⅛ for the account."

To whom was this sold? Complainants were not at the time advised, but they *were* advised that a contract had been entered into on their behalf whereby they contracted with Somebody to deliver to him on the last day of July, 1896, 500 shares of Diamond Match Stock for $221.12½ per share. And it is stipulated that such a sale was made. (Tr. p. 119.)

Stopping at *this* point, and in the absence of any other testimony, what is to be said of this contract? Is it *prima facie* illegal?

One thing certain, it is not a contract for a *privilege* or an *option*. It *obligates* the complainants *to deliver* a certain number of shares to the contractee at a certain time and at a certain price. If it is *prima facie* illegal, *so is every other contract for future delivery.*

Does the contract indicate an intention to gamble? Would any court permit a jury *to infer a mutual understanding and intention* of the parties *not* to deliver or receive the shares contracted for from the terms of a contract which said they must?

But the question recurs, at *what point* in the history of this transaction *did it become evident* that the *original intention* of the complainants was to gamble? Or when was the *absolute* contract for sale converted into an *optional* contract to sell or not to sell?

CERTAINLY NOT ON THE 16TH DAY OF JULY. DURING TWENTY-FOUR HOURS, THEREFORE, THE CONTRACT APPEARED TO BE BOTH LEGAL AND BINDING.

Let us proceed to the day following, when we will assume that there was substituted by the manager of the stock exchange for the original contractee a new purchaser at a lesser price.

Nobody will contend that ordinarily the complainants or their agents would be *bound to consent* to this substitution. Ordinarily, and according to the conventional contract, the parties would remain the same *to the end*, in which event, we venture to say, the Court of Appeals would not have branded the contract as unlawful or the parties to it as amenableto the criminal code.

But (and to this question, so it seems to us, the whole controversy has reduced itself) *would the consent of the complainants to the novation of the contract and the substitution of a new contractee render it illegal? If so, why? If the original contract indicated no intention to gamble*, what element in the new contract would indicate such an intention? Petitioners certainly had a right to make the novation if their contractee would assent to it.

Whether either party could be *induced* to consent to the novation would depend entirely upon circumstances.

The manager of the stock exchange clearing house, in whom is vested plenary authority to make these substitutions, makes them according to the *number* of shares sold, without reference to the *price*. It is an immense service *to him* in keeping books and in effecting exchanges.

He, therefore, we will say, undertakes to substitute for A (the original purchaser), B, *who has purchased a like number of shares*. B, however, instead of purchasing his shares at 221⅛ agreed to take them, we will say, only at 220. *He would not consent, therefore, to be substituted under a contract that called for the payment of* 221⅛ *per share, nor could the seller be expected to accept as a substitute some one who agreed to pay only 220 per share.* But if the substitution is to take place, *if this great advantage in bookkeeping and facilitating exchanges is to be realized,* some method *must* be devised whereby petitioners will be willing to accept B, and B will be willing to accept petitioners.

Obviously this can only be done by *equating* the prices. *If this is done the parties can have no reasonable excuse for withholding their consent. It would be a distinction without a difference.* Neither party would be *benefited,* neither party would be *injured;* neither party would *make* a cent, neither party would *lose* a cent, by the transaction. THE ONLY POSSIBLE BENEFIT, THEREFORE, WOULD BE TO THE EXCHANGE ITSELF, AND THE ONLY POSSIBLE OBJECT WOULD BE THE AVOWED OBJECT OF FACILITATING BOOKKEEPING AND EXCHANGES.

Surely this object is not an unlawful one.

What we are in search of, however, is evidence of an intention to gamble, and this the Circuit Court of Appeals affect to find, *not in prior dealings of the parties* (for, so far as the testimony reveals, this was the only transaction ever had between them), *not in the original contract itself* (for that was absolute and unequivocal for the sale of a number of shares of stock at a certain price at a certain time), but in the subsequent mutations of the contract growing out of the rules and customs peculiar to the stock exchange, *involving no risk to the complainants, no possibility of gain or loss to them, modifying in no essential particular the original purpose of the complainants, affording no motive or object to the complainants to assent to it, except the motive to accommodate the exchange itself.*

Of course the sale of August 3d in the case at bar stands on its own bottom. It was a *new* contract. The original contract had been extinguished. There could not have been a "novation" *except* it had been extinguished. In legal contemplation the complainants must be regarded as having authorized their agents, Schwartz, Dupee & Co., on August 3d, to make the contract they did with Jamieson & Co.

We are frank to say that it required a careful study of the English cases cited in our principal brief to straighten this out in our own minds. We were conscious of a persistent mental effort to associate the contract of August 3d with the contracts of July 16th and 21st. Not until the careful and painstaking reasoning of Justice Blackburn demonstrated that the original contract was the *cause* and the ultimate contract was the *effect*, and that there was at most only a casual connection between them, did the great machinery of clearances, evolved through commercial necessity, become comprehensible and beautifully simple.

Respectfully submitted,

HENRY CLEWS,
CHARLES M. FOSTER,
JAMES B. CLEWS,
Petitioners.

By FRANK O. LOWDEN,
HERBERT J. DAVIS,
HENRY D. ESTABROOK,
Counsel for Petitioners.

HENRY D. ESTABROOK,
Of Counsel.